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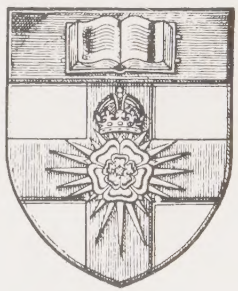

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THE

CRIMINAL APPEAL REPORTS

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JANUARY 13, 1930, TO MARCH 9, 1931.

EDITED BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

EDWARD VANNIASCHERAM CHARAVANMUTTU.

1930.
13 *January.*

Indecent Conduct — Accomplices — Corroboration — Silence of Accused when Charged—Corroboration of one Date not necessarily Corroboration of Another.

It is an insufficient direction to the jury that material witnesses may be accomplices; it must be added that if this is found, there ought not to be a conviction unless there is corroboration.

On corroboration generally, BASKERVILLE, 12 Cr. App. R. 81, etc. : 1916, followed.

The silence of the accused, on being charged, is not a matter to be left to the jury : J. WHITEHEAD, 21 Cr. App. R. 23, etc. : 1928, followed.

Where similar offences are indicted on different dates the greatest care must be taken in charging the jury that evidence concerning one date should not be used as corroboration of that concerning another.

See 21 Cr. App. R. 184.

Sir Henry Curtis Bennett, K.C. (*W. H. Owen* and *C. Humphreys* with him) for the appellant, who had been on bail and was present :

Appellant was charged with indecent conduct towards two boys named Lambert and Nicholson. The first two counts in the indictment related to an alleged offence with Nicholson on August 31, 1929, and on these counts appellant was convicted. Counts 3 and 4 related to an alleged offence with Lambert on September 1. On these counts appellant was acquitted. The remaining counts in the indictment related to alleged offences with Lambert on August 29, 30

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and 31. Appellant was convicted on these counts. Appellant had been connected for seven years with the Boy Scouts and Young Men's Christian Association movement. The offences were alleged to have been committed at a Y.M.C.A. Camp at Mapleton, Yorkshire. Hawke, J., pointed out to the jury that in cases of sexual offences against young persons, whether they were accomplices or not, a jury should look for corroboration implicating the accused. In this case the only suggested corroboration consisted of three matters. First, the prosecution sought to rely on the fact that in a hut occupied by appellant and the boys two beds were placed unusually close together. The evidence on this point, however, related only to September 1 and appellant was acquitted of the offence charged on that date. Secondly, some stress was laid on the fact that the door of the hut was locked by the appellant. There was, however, evidence that at least one other person used to lock the door, and the evidence was quite consistent with the locking being for a legitimate purpose. Thirdly, the judge in his summing-up commented on the fact that the accused, when charged, did not deny the charge, but merely stated: "I reserve my defence." It is true that he did not speak of this matter as amounting to corroboration, but it appears to have been left to the jury as a matter which might be corroboration. J. WHITEHEAD, 1929, 1 K. B. 99; 98 L. J. K. B. 67; 139 L. T. 640; 92 J. P. 197; 21 Cr. App. R. 23: c.q.: is a clear authority that failure to deny a charge in such circumstances cannot be corroboration. None of these matters should have been treated as corroboration and there was in fact no corroboration at all.

Burnand, for the Crown:

The judge gave the jury the proper warning in regard to corroboration and, after that warning, the jury convicted. There was here some corroboration for the jury to consider. The extraneous evidence of a man who looked into the

hut on September 1 and saw two beds placed together corroborated the statement of one of the boys that the beds were in the same position on the previous night. This was the only matter relied on as corroboration by the prosecution. The silence of appellant on the charge being made does not appear to have been treated by the judge as corroboration or as a matter of importance. The Crown does not seek to challenge the judge's statement that, for certain purposes, the boys might be regarded as accomplices, but the jury were sufficiently warned of the necessity of corroboration.

THE LORD CHIEF JUSTICE: It is material to observe, as counsel has pointed out, that the offences comprised in the ten counts of this indictment cover a series of days and that with regard to the offences charged as having been committed on September 1 the jury found the prisoner not guilty. In cases of this character it is essential that there should not be a conviction in the absence of corroborative evidence, unless the jury have been clearly and properly warned. In the judgment of this Court in BASKERVILLE, 1916, 2 K. B. 658, 667; 86 L. J. K. B. 28; 25 Cox C. C. 524; 115 L. T. 453; 80 J. P. 446; 60 S. J. 696; 12 Cr. App. R. 81, it is stated, p. 91, Cr. App. R.: "We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it," and a little later: "It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has

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been committed, but that it was committed by the accused." Now, in the present case, as appears from the summing-up, the boys who were said to have been concerned in these offences were undoubtedly treated as being accomplices, and counsel for the Crown does not challenge the description. It was essential, therefore, that a proper warning should be given in regard to the necessity of corroboration of their testimony, if it was to be acted upon. That these boys were described as accomplices is apparent, but that is not enough. It was necessary also that the jury should be warned of the danger of acting on their evidence in the absence of corroboration. A warning may be somewhat misleading and worse than useless if, afterwards, matters which are not really corroborative are treated as if they were corroborative in a case of this kind, where there was and is ground for suspicion that an untrue charge had been trumped up against the accused from interested motives. It was more than ever necessary that the law relating to corroboration and the exposition of the evidence said to be corroborative should be clear and sufficient.

It is quite clear that three matters were treated, if not, indeed, as being evidence of corrorboration, as being matters which tended to support the evidence of the boys. One was the silence of the accused at the time when the charge was made—silence amounting to this, at any rate, that at the stage then reached he said that he reserved what he had to say. It is true that this remark was not treated as corroboration under the name of corroboration, but at the close of the summing-up the incident was brought prominently to the attention of the jury as something which might help them on the main question. It would be unfortunate if the jury thought that mere silence of the accused might amount to corroboration, for it is well settled since the decision in WHITEHEAD [above] that it could not be.

Two other matters were treated as supporting the boys'

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story. One was the locking of the door of the hut. But the evidence showed that the door was from time to time locked for perfectly proper reasons, and at the close of the case the locking of the door had become a thing indifferent, not tending at all to support the case for the prosecution. Finally, there was some evidence that in this hut two beds were placed unusually near each other. But the evidence on this point was that of a person who had taken but a hasty glimpse of the interior, and he was speaking of September 1, the day in regard to which the jury found the accused not guilty. If indeed that which was observed in regard to the beds on September 1 was to be treated as corroborating the story told about August 31, it was at any rate essential that the real nature of the problem should be pointed out and the difference in dates should be made plain. There was, however, no such exposition and, indeed, there is a certain vagueness with regard to times and occasions in this part of the summing-up.

We have come to the conclusion that, in these circumstances, the conviction ought not to stand. There was in substance no corroboration, and there was some ground for the suspicion that someone was aiming at the accused as the result of a conspiracy to trump up a charge against him. More it is not necessary to add. There are some other aspects of the case which might call for observation, but it is enough to say that we have come to the conclusion that this verdict was an unsatisfactory one. The appeal is allowed and the conviction quashed.

Conviction quashed.

Solicitor for appellant: H. S. L. Polak.

T. R. F. B.

BEFORE

MR. JUSTICE TALBOT, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

ELLIS ARTHUR SOUTHERN.

1930.
20 *January.*

Distinct Charges—One Indictment—Separate Trials—Separate Verdicts—Corroboration Statutory or Other—Summing Up. Child's Unsworn Evidence—Appreciation of Duty of Veracity—Judge's Duty.

When distinct charges are tried together the jury must be directed to observe the distinctions and not to allow evidence on one charge to affect their view of another.

Whether corroboration is required by statute or practice, the judge should deal with its presence or absence in addressing the jury; failure to do this may be ground for quashing a conviction.

Quære whether unsworn evidence is admissible under section 30 of 8 Edw. 7, c. 67, the Children Act, 1908 (as amended by 4 & 5 Geo. 5, c. 58, s. 28), unless the judge has ascertained in open court that the conditions prescribed by that section are fulfilled.

Observations on the separate trials of counts.

Appeal against conviction and sentence.

Appellant was convicted at Manchester Assizes on November 29, 1929, of gross indecency with a male person and indecent assault upon a young female, and was sentenced by Mr. Justice Macnaghten to two years' imprisonment with hard labour.

E. G. Woodward for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present:

Appellant was charged with gross indecency with a boy aged thirteen on June 14, 1929, and with indecent assault on a little girl aged five on November 2, 1929. The two offences alleged were joined in one indictment, and were

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tried together. The prisoner was unrepresented at the trial. The trial of these two offences together cannot be justified. They were offences of an entirely different nature, and were alleged to have been committed at an interval of nearly five months. The judge should have ordered them to be tried separately. In CASTRO, 6 App. Cas. 229, 244; 45 J. P. 452; 50 L. J. Q. B. 497; 44 L. T. 350; 29 W. R. 669; 14 Cox C. C. 546: 1881, Lord Blackburn said that at common law any number of felonies or any number of misdemeanours might be tried together, and added: "There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him," but that in a proper case a judge would grant an application for separate trials. In L. D. BAILEY, 1924, 2 K. B. 300; 93 L. J. K. B. 989; 132 L. T. 349; 88 J. P. 73; 27 Cox C. C. 692; 18 Cr. App. R. 42; c.q., it was laid down that the jury must be expressly warned that they must not allow evidence relating to one charge to influence them when they are investigating another, but no such warning was given here. Secondly, there was no statement anywhere in the summing-up that corroboration was necessary in offences of this kind. In the case of the offence against the girl, corroboration was required by section 30 of 8 Edw. 7, c. 67, the Children Act, 1908. SCHIFF, 15 Cr. App. R. 63: 1920, appears to decide that the fact that the statute has not been expressly referred to is not in itself a ground for quashing a conviction, but in that case the corroboration was clear and obvious. [TALBOT, J.: The headnote in the report appears to be in rather wider terms than the decision actually warranted. We have looked at the summing-up in that case, and we find that the judge referred to the question of corroboration and dealt with the corroborative evidence,

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though he did not tell the jury that corroboration was required by statute.] There was here corroboration in the case of the offence against the girl, but none in the case of the offence against the boy.

A. E. Baucher, for the Crown:

There was here corroboration in both cases. In the case of the boy, every step leading up to the act of indecency was admitted by the appellant, and corroboration is to be found in the evidence of the appellant himself. With regard to the case of the girl, there was clearly corroboration and the summing-up is full of details which help to make that corroboration, although the word " corroboration " was not used. The evidence throughout the trial was kept in two clear compartments, and the accused was not prejudiced by having the offences tried together. This is a case where no substantial miscarriage of justice has occurred, and the Court is asked to apply the proviso to section 4 of the Criminal Appeal Act, 1907. [He referred to E. MURRAY, 30 T. L. R. 196; 9 Cr. App. R. 248: 1913.]

TALBOT, J.: The appellant was indicted in two counts for offences of an abominable character. The first count charged an offence against a boy aged thirteen, and the second count an offence against a girl aged five, which was alleged to have been committed at or near the same place as the first offence, but at a date some four or five months later. The appellant was convicted on both counts, the two being tried together, and was sentenced to two years' imprisonment with hard labour.

The appellant was not represented by counsel at the trial and probably for that reason no application was made to the judge to try the two charges separately. There is no objection to the inclusion of the two charges in one indictment, but we think that, if an application had been made, the judge would in all probability have directed that they should be tried separately, because although they

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were offences of the same class, arising from filthy lust, they were not the same in law, nor were they in fact connected except by the circumstance that the same man was accused of both. If, however, an application for separate trials had been made to the judge, and the judge, after considering the application, had decided that the offences should be tried together, we do not think that we could have interfered; but, where two cases of this kind are tried together, it is obvious that special caution is necessary to prevent that fact being prejudicial and unjust to the accused. The principle was very clearly stated by Lord Blackburn in the House of Lords in CASTRO, in the passage cited on behalf of the appellant, and it is a principle of common sense. It is quite obvious that if two or more charges resembling one another are made against one man and are tried together, a jury can hardly help feeling more inclined to believe that the man is guilty of one charge, because there is evidence that he has been implicated in another similar offence. As Lord Blackburn said, the procedure, unless very carefully guarded, may in fact amount to the giving of evidence of bad character against the accused, which is forbidden by the rules of criminal practice, though, as a matter of common sense, it is more likely, in fact, that a man should be guilty of filthy conduct on one occasion if he has been guilty of it on another. The matter was dealt with recently in the case of L. D. BAILEY [above]. In that case a schoolmaster had been prosecuted for indecent offences against no less than sixteen of the boys of his school, and the question of the duty of the judge before whom such an indictment is tried was discussed in this Court, and the conviction was quashed. The headnote lays down two matters, the observance of which is imperative. It is in the following terms: "Where an indictment for indecent assault contains a number of counts, each count charging a separate assault on a different person, the jury should be directed not to return a general verdict

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but to return a verdict on each count "—that is to say, it must be impressed on them, and be made abundantly clear by the fact that they have to return a separate verdict on each separate charge, that the charge against the accused is not a general charge of being a filthy man, but a charge of having done one or more of the acts alleged, and in each case there must be a separate finding by the jury that he has done that act. The headnote continues: " . . . and they should be warned to draw a careful distinction between the evidence on each count and the evidence on every other count and not to supplement the evidence on any particular count by looking at the evidence as a whole." That is to say, that, as far as is possible, the jury, in considering whether a particular charge is proved, are to shut out altogether from their minds the fact that other charges have been made against the same man. It is quite clear that in this case neither of the principles laid down in BAILEY [above] was followed, and it is obvious that any difficulty in which the accused was placed on the trial of this case was greatly enhanced by the fact that the jury considered these two charges indiscriminately, except that the judge dealt with them separately in the summing-up. In our opinion, on that ground, the conviction cannot be allowed to stand.

Then arises a further point. These two charges stand on a totally different footing in point of law. In the case of the little girl, who was five years of age, her evidence was admitted unsworn. That was an exception introduced by the Children Act, 1908, to the general fundamental rule of our procedure that no evidence can be given in the absence of an oath, or an affirmation in the cases where a witness is allowed to affirm instead of being sworn. That statute allowed such evidence to be given in the case of children too young to appreciate the nature of an oath, but expressly provided: " A person shall not be liable to be convicted of the offence unless the testimony admitted by virtue of

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this section and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused." Now, it is quite clear from the proceedings in this case that both the judge and the jury were strongly convinced that the evidence which they had heard was true and, perhaps for that reason, the judge not only omitted to bring that statutory provision to the notice of the jury, but in fact never in terms mentioned the question of corroboration at all in his summing-up. He never used the word "corroboration," and never, either by that word or by any other words, impressed upon the jury the importance of looking for corroboration, and, in the case of the boy, where corroboration is not required by statute, he in effect told the jury that the whole question lay between the oath of the boy and the oath of the prisoner and, though the judge did not say this, the jury may well have inferred that it was neither necessary nor important that corroboration should be found. It is too much to say, especially in view of the decisions of this Court in MURRAY [above] and SCHIFF [above] that it is a rule of law that if, in a case where unsworn evidence has been adduced, the judge does not call the jury's attention to the provisions of the statute, that necessarily invalidates the conviction; but it is quite clear that the judge ought to draw attention to it, because the jury will approach and ought to approach the question of corroboration more carefully, if they know that it is required by an express statutory provision, and not merely by the ordinary rule of common sense and fairness which makes it desirable that the evidence of young persons, particularly in offences of this kind, should be corroborated. It is enough to say that it is not absolutely necessary in point of law that in a case where corroboration is required by statute the provisions of the statute should be *expressly* brought to the minds of the jury, but it is necessary that it should be impressed upon the jury that one of the matters to which they must direct their attention is the question of

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corroboration. We fear that in this summing-up that matter was not sufficiently impressed upon the jury. It is not immaterial to observe that no allusion was made to the great difference between the two charges, that in the one case corroboration was required by statute, while in the other it was not; again, that in one case there was in fact corroboration, while in the other there was none. In our opinion, the omission of the judge to call the attention of the jury to the relevant provisions of the statute, coupled with the absence of any adequate direction on the question of corroboration at all in the case relating to the girl, makes it impossible for the conviction to be supported. With regard to the case relating to the boy, the following passage occurs in the judgment in BAILEY [above], citing the judgment of this Court in CRATCHLEY, 9 Cr. App. R. 232, 235: 1913: "In our view, there ought in such cases to be a warning by the judge, and it ought to be brought home to the minds of the jury that they must act on evidence of this character with extreme care. In such cases it is generally desirable, apart from any rule of law, and whether the witnesses are accomplices or not"—in the present case the judge assumed—probably rightly—that the boy was not an accomplice—"that a warning should be given to the jury about acting on the evidence of boys of this age—twelve and under ten—who are concerned in such an offence." In that case the age of the boys was somewhat less than in the present case. The jury were entitled, if they thought fit, to act on the evidence of this boy, though not corroborated, but undoubtedly it was the duty of the judge to point out the general importance of corroboration in charges of this kind. On all these grounds, we are of opinion that this conviction cannot stand, and must be quashed.

There is a further point which might have arisen, but which was not taken at the bar—whether the evidence of the little girl was properly admitted at all. As I have

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said, such evidence is admitted only on certain conditions, which obviously impose a very difficult task on the judge. The first condition is that the court must clearly be satisfied that the child does not understand the nature of an oath. Unless this condition is fulfilled, there is no power to admit evidence not on oath.

Having come to that conclusion affirmatively, the judge may receive the evidence, though not given on oath "if, in the opinion of the Court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." It is obvious that that provision imposes an extremely delicate task on the judge. The point has not been argued, and we say nothing further than this, that the Court must not be taken as having expressed the opinion that it is legitimate to receive the evidence of a child of tender years under the provisions of the statute without some investigation by the Court, in the presence of the accused and jury, whether the provisions of the statute have been satisfied.

We have come to the conclusion, though with great reluctance, that this conviction must be quashed.

Conviction quashed.

T. R. F. B.

PERCY GIBSON.

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20 *January.*

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Talbot, J., Charles, J., Humphreys, J.

Bigamy — Scots "Irregular Marriage" — Defence of Mistake about the Law.

Severity of sentence for bigamy.

Appeal against sentence.

Appellant was convicted of bigamy at Leeds Assizes on November 29, 1929, and was sentenced by Hawke, J., to twenty-one months' imprisonment with hard labour.

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20 *January.*

PERCY GIBSON.

Talbot, J., Charles, J., Humphreys, J.

Appellant in person.
No counsel appeared for the Crown.

TALBOT, J.: Appellant married his lawful wife in Scotland in 1914 by what is known as an "irregular marriage." In December, 1928, he went through a form of marriage with another woman, who said that he treated her well, but that they were poorly off in the way of money. The judge took the view that the accused perfectly well knew that he was married already and made excuses to avoid marrying the second young woman, who was pregnant by him. The story told by the accused had, however, some plausibility and was not impossible. He said that before he was acquainted with the second woman he had looked up in a public library the question of the effect in England of a Scottish "irregular" marriage, and had come to the conclusion that it would have no effect in England. There is good ground for thinking that he is mistaken, and may have been influenced by that mistake in thinking that he need fairly say nothing to the second woman about the first marriage. He ran the risk, however, of being wrong on what was an extremely doubtful question and, if he had been a candid and honourable man, he would have told her what had happened.

On the whole, believing that the judge did not take sufficient account of the grounds the accused may have had for this belief and that he concluded too readily that the accused must have been consciously dishonest, we think that the sentence was not justified and that it should be reduced to a sentence of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

MR. JUSTICE TALBOT, MR. JUSTICE MACKINNON AND MR. JUSTICE CHARLES.

LAWRENCE TEARNE.

1930.
27 *January.*

Uniformity in Sentences—Remanet.

Severity of sentence when a *remanet* is to be served.

Appeal against sentence.

Appellant pleaded guilty at Middlesex Sessions on January 4, 1930, to pavilion-breaking and larceny, and was sentenced by the Chairman to four years' penal servitude.

No counsel appeared, and appellant was not present.

TALBOT, J.: The total value of the articles stolen was 25s. The appellant's record is, however, a bad one; he is about thirty years of age and has been previously convicted eight times for larceny, housebreaking and the like. He was released on licence from his last sentence, a sentence of three years' penal servitude, and has now a term of about eight months to serve. The Chairman took the view, which was perhaps not an unnatural one, that in the circumstances it would be better for all parties if the appellant were put out of the way of committing crime for a considerable period. It does not, however, appear to have been mentioned that he had a substantial *remanet* of a previous sentence still to serve. We have for our guidance a very recent decision of this Court: A. WALLACE, 21 Cr. App. R. 143: 1929; s.r., which bears a curious similarity to this case. This appellant has not been convicted so often as the appellant in that case, but on the other hand he has a substantial *remanet* of a previous sentence to serve. It is very desirable that uniformity in the practice of this Court should, as far as

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27 *January.*

LAWRENCE TEARNE.

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possible, be observed. In all the circumstances, we think that this sentence should be reduced to the same sentence as was substituted in that case—a sentence of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

MR. JUSTICE TALBOT, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

1930.
3 *February.*

RICHARD WILLIAM EVENS.

Submission at Close of Case for Crown — Verdict against the Weight of Evidence.

On a charge of knowingly receiving stolen goods there must be unequivocal evidence of the receiving of a chattel proved to be stolen.

Appeal against conviction and sentence.

Appellant was convicted at Glamorganshire Sessions on January 7, 1930, of knowingly receiving stolen goods, and was sentenced by the Chairman to six months' imprisonment with hard labour.

Arthian Davies, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present, was not called on to argue.

Ivy Williams, for the Crown, did not seek to support the conviction.

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3 *February.*

RICHARD WILLIAM EVENS.

Talbot, J., Charles, J., Humphreys, J.

TALBOT, J.: The appellant was indicted with two other men on an indictment containing four counts. The first and second counts charged them with breaking and entering an office and stealing, or, alternatively, knowingly receiving, eighteen pence, a tin of milk and other goods; the third and fourth counts charged them with breaking and entering another office and stealing, or, alternatively, receiving, a box, one shilling and threepence and other articles. One of the men pleaded guilty to the whole indictment; the appellant and another man pleaded not guilty. The Chairman directed the jury to find the appellant not guilty on the last two counts, but allowed the case against him on the first two counts to go to the jury, and the jury convicted him of receiving. A submission had been made at the trial on behalf of the appellant that there was no evidence against him on any part of the indictment. Among the goods stolen from one of the offices was a coat, and a coat was produced in court. There was no evidence that the coat produced was the coat which had been stolen, and appellant said that it was his.

There was in reality no evidence on which the appellant could be convicted, and the conviction is accordingly quashed.

Conviction quashed.

T. R. F. B.

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3 *February.*

ALBERT EDWARD STENSON, FREDERICK WINTERBOTTOM.

Talbot, J., Charles, J., Humphreys, J.

ALBERT EDWARD STENSON.
FREDERICK WINTERBOTTOM.

Borstal Institution—Limitations of Power of Court of Trial.

The mere fact that accused is within the statutory limits of age does not justify a sentence to Borstal discipline; the other statutory conditions of section 1, sub-section 1 of 8 Edw. 7, c. 59 : the Prevention of Crime Act, 1908, must be fulfilled.

Appeals against sentence.

Appellants pleaded guilty to housebreaking and larceny at Colchester Sessions on January 6, 1930, and were each sentenced by the Recorder to three years' detention in a Borstal institution.

Appellants, in person.

No counsel appeared for the Crown.

TALBOT, J. : Appellants are young soldiers, each being aged twenty. There are no convictions by the civil courts against either of them. Stenson has been convicted several times of offences against Army discipline, while Winterbottom's Army character is good. The police report that both men had good characters in civil life.

The conditions on which a Court has power to order young persons to be detained in a Borstal institution are defined by statute 8 Edw. 7, c. 59, s. 1, sub-s. 1 : Prevention of Crime Act, 1908. They must be of " criminal habits or tendencies," or there must be " association with persons of bad character." Here there was no evidence of criminal habits or of association with persons of bad character, and we think that the Recorder, in sending these young men to Borstal, unwittingly went outside his power.

We think that there should be substituted, in each case, a sentence of seven months' imprisonment in the second Division, to run from the date of conviction.

Sentence reduced and varied.

T. R. F. B.

BEFORE

MR. JUSTICE TALBOT, MR. JUSTICE CHARLES AND MR. JUSTICE HUMPHREYS.

ROBERT HENRY THOMAS CLIVE.

1930.
10 *February.*

Accomplices—King's Evidence—Unequivocal Warning of Jury.

Summing up must be emphatic on the danger of accepting the uncorroborated evidence of accomplices and care must be taken that suggested corroboration is in fact adequate.

Appeal against conviction.

Appellant was convicted at Oxfordshire Sessions on January 7, 1930, of attempted shopbreaking, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour.

W. M. Andrew, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was indicted with four other men. Two had already pleaded guilty to breaking and entering another shop, and they gave evidence against appellant on this charge. They had not then been sentenced for the other offence. The summing-up dealt with corroboration in an unsatisfactory manner, and matters were treated as corroboration which could not rightly be so regarded.

W. G. Earengey, for the Crown:

The summing-up was not a very fortunate one, but the jury did receive some warning against accepting the uncorroborated evidence of accomplices.

TALBOT, J.: We are clearly of opinion that this conviction cannot be upheld. There is no doubt that the two men who gave evidence against the appellant did so in circumstances which made it imperative, not only on the

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principles laid down over and over again in this Court, but also on the elementary principles of fairness and justice, that the jury should be warned against the danger—a very real danger in this case—of convicting on the uncorroborated testimony of accomplices. It seems to us clear that no sufficient warning was given in this case, and we think that the Chairman very greatly exaggerated the volume and weight of the corroboration, if any existed at all. In our opinion, in view of the way in which the case was put against the appellant by the Chairman in his summing-up, the conviction cannot be supported and must be quashed.

Conviction quashed.

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10 *February.*

DENNIS TERRENCE O'BRIEN.

Talbot, J., Charles, J., Humphreys, J.

DENNIS TERRENCE O'BRIEN.

Severity of Sentence after many Previous Convictions.

Appeal against sentence.

Appellant pleaded guilty to obtaining food by false pretences, and to larceny, at Durham County Sessions on January 6, 1930, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

TALBOT, J.: Seven other cases of larceny and false pretences, involving altogether a sum of about £30, were considered by the Bench in passing sentence. The appellant's age is forty-two, and he undoubtedly has a very bad record. He has been convicted altogether twenty-eight times, mostly for larceny or obtaining goods or money by

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false pretences, and has served three terms of penal servitude. His health is very bad, and no doubt this does not assist him in getting or keeping work. He does show that he has made real efforts to get work, and there is no reason to think that his failure to keep work was due to anything except his physical infirmity. He has suffered from ill fortune in another respect: he gave evidence for the Crown on a charge of murder, and in the course of the trial was severely cross-examined by counsel for the accused on his previous record, and this publicity can have done him no good.

We have great reluctance and hesitation about interfering with a sentence passed, as this was, after careful consideration, but, on the whole, we think that this sentence was too severe, and we substitute a sentence of three years' penal servitude.

Sentence reduced.

T. R. F. B.

JAMES BRIDGER.

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JAMES BRIDGER.

Talbot, J., Charles, J., Humphreys, J.

Stolen Chattels—Identification—Misdirection.

A definite mistake in a summing-up about the identification of a chattel charged in the indictment to have been stolen may be ground for quashing a conviction.

Appeal against conviction.

Appellant was convicted at Cardiff City Sessions on January 13, 1930, of knowingly receiving stolen goods, and was sentenced by the Recorder to six months' imprisonment with hard labour.

P. Doyle, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present: Appellant was charged with stealing, or, alternatively,

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knowingly receiving, notes and a cash-box. The Recorder, in his summing-up, did not deal with the question of receiving. He should have told the jury what constituted the crime, and how much evidence they should require to support it. Further, although the identity of the cash-box was never established, he directed the jury that it was.

H. H. Roskin, for the Crown:

A cash-box was found in the possession of the appellant of the same kind and description as that lost by the prosecutrix, and the jury must have been convinced that the appellant was in possession of the stolen box. It is submitted that in this case, although the Recorder referred to the identification of the cash-box in somewhat definite terms, no substantial miscarriage of justice has occurred, and that the Court should apply the proviso to section 4 of the Criminal Appeal Act, 1907.

TALBOT, J.: There was no direct evidence to connect the appellant with entering the house from which the property disappeared, and the relevant evidence on the charge of receiving depended entirely on the identification of two things—a ten-shilling note and a small cash-box, the former of which was found in his possession when he was arrested on this charge and the latter of which had been found in his possession in the middle of the night on which the crime was committed. Both are very common articles, but there was a suspicious similarity between them and the stolen property. The ten-shilling note had a spot of ink on the front, close to the signature, and the prosecutrix had said at the police court that her note had a spot of ink on the back of it; finally she said that she could not positively swear that the note produced was hers, but that it was like it. With regard to the cash-box there was perhaps still more suspicion. The appellant had a cash-box on him when he was arrested on the night of the crime for using obscene language in the street, and the police officer, who saw it

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when he took it from him that night, gave a description of it which corresponded with the description which the prosecutrix gave of her box: it had been returned to appellant when he was released on bail soon after midnight and was not produced. Further, when a police sergeant called at the appellant's house on the next day and asked him where was the cash-box which he had in his possession on the previous night, the appellant pointed to the chimney-piece and said: "I think that is the one." The sergeant, however, said that that cash-box had dust on it and did not look as if it had been taken out recently, and that it was not the missing one nor the one found in the appellant's possession on the previous night.

The question might arise whether, even if the matter had been properly left to the jury, the evidence was sufficient to justify a conviction. In any event, the matter should have been left to them with a clear direction in respect of the difficulties in the case and the burden of proof, and should have been left for their decision without any misstatement of the circumstances. We find, however, that the Recorder, after correctly stating the evidence about the note, proceeded: "If one believes the evidence of the police there is no doubt that when this man was arrested about midnight he had *the* cash-box on him." If that had been accurate, it would have gone very far towards deciding the case; but it was not accurate, because it begged the very question which the jury had to decide—the identification of the cash-box. In view of that summing-up, as directed to the particular circumstances of this case, we are of opinion that this conviction cannot be supported and must be quashed.

Conviction quashed.

T. R. F. B.

BEFORE

MR. JUSTICE ACTON, MR. JUSTICE TALBOT AND MR. JUSTICE MACKINNON.

1930.
3 *March.*

JOHN LEWIS DAVIES.

Carnal Knowledge—Corroboration—Mistake of Fact in Direction.

A misdirection on a material fact is sufficient to invalidate conviction.

Appeal against conviction.

Appellant was convicted at Carmarthenshire Assizes on January 27, 1930, of carnal knowledge of a girl under the age of thirteen years and was sentenced by Macnaghten, J., to fifteen months' imprisonment with hard labour.

J. J. Davies, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The judge correctly warned the jury on the general law relating to corroboration, but it is submitted that he was wrong in holding that there was corroboration in this case. The jury were confused with regard to the facts, and were led to assume that a pair of knickers exhibited in Court had been taken possession of by the police and handed to a doctor for examination, and that the doctor had in fact examined them. There was confusion with regard to the identity of these knickers. [He was stopped.]

Daniel Johns, for the Crown:

The confusion with regard to the knickers did occur, but it is submitted that the condition of the girl's clothing was not the only matter regarded by the judge as corroboration.

ACTON, J.: In substance the ground on which this appeal was based was that of misdirection, the principal misdirection relied on by the appellant being that the judge was

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wrong in ruling that there was any corroborative evidence implicating the accused. In the course of the case considerable evidence was given of the condition in which a pair of knickers worn by the girl was found to be after the time at which, according to her testimony, the assault was committed upon her by the accused. Most unfortunately, by a combination of errors, the judge was led into what this Court apprehends to be a confusion on this part of the case, and, unfortunately, that confusion which had arisen was reflected in the summing-up. The offence against the girl was alleged to have been committed between noon and 2.15 p.m. on December 30. About 4.30 p.m. on January 1 a doctor examined the girl, and, as part of his evidence in Court, that doctor identified certain stained knickers and said that the girl was wearing these when he examined her. A constable gave evidence that on January 2 he went to the house of the girl's mother, and that there a pair of knickers was handed to him. There was no evidence that the doctor ever saw or examined two pairs of knickers. Counsel for the prosecution stated, clearly in error, that the constable "said he took possession of the knickers and produced them to the doctor." At the conclusion of the case for the prosecution counsel for the defence said: "The doctor did say in his evidence that the little girl was wearing the dirty knickers when he examined her," and Macnaghten, J., after referring to the shorthand writer, said: "The doctor's recollection was not quite right. The evidence is that the knickers were taken possession of by the police, and were produced to the doctor. The doctor in the witness-box said the girl was wearing those knickers at the time when the girl came to see him. It seems that the doctor was mistaken." After the case for the prosecution had been closed, the girl and her aunt were recalled, and they then gave evidence that on January 1, before the visit to the doctor, she put on clean knickers. Neither the doctor nor the police officer were recalled on this point. What followed was that

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J.

the judge, in the course of his summing-up, referred to the question of stains on the knickers as a matter of some importance, and the matter was ultimately left for the consideration of the jury on the basis that the knickers produced in Court were the knickers which the girl had been wearing when, as she alleged, she was assaulted by the accused, and that these knickers had been taken possession of by the police and by them produced to the doctor, and that the doctor had identified them as being the knickers which bore the stains. There was, however, no evidence that the knickers the child had been wearing at the time of the alleged assault had ever been handed by the police to the doctor for examination. If the evidence of the child and her aunt, and that of the doctor, who was not recalled, is to be accepted, it follows that what the doctor saw when he examined the child was a pair of knickers, with which the accused could have been in no way concerned, and which were put on only on January 1 for the purpose of the visit to the doctor.

The matter was left to the jury on the assumption of the facts as indicated, and this very pair of knickers, in regard to which this most unfortunate confusion had arisen, was given to the jury to examine. In these circumstances the case was left to the jury in an unsatisfactory manner and the conviction cannot stand. Apart from this question there appears to be very grave doubt whether corroborative evidence of any kind existed, but this is a matter which it is not necessary to consider with particularity.

Conviction quashed.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TALBOT AND MR. JUSTICE FINLAY.

SIDNEY SCOFFIN.

1930.
17 *March.*

Borstal Institution—Age on Date of Sentence—4 & 5 Geo. 5, c. 58, the Criminal Justice Administration Act, 1914, s. 10—15 & 16 Geo. 5, c. 86, the Criminal Justice Act, 1925, s. 46, sub-s. 1.

A Court has no jurisdiction to sentence to Borstal treatment anyone "more than twenty-one years of age."

Appeal against sentence.

Appellant was convicted of larceny at Rochdale Petty Sessions on January 22, 1930, and was committed for sentence to Manchester Assizes under section 10 of the Criminal Justice Administration Act, 1914, as amended by section 46, sub-section 1 of the Criminal Justice Act, 1925. At the assizes he was, on February 18, 1930, sentenced by Swift, J., to three years' detention in a Borstal institution.

E. G. Woodward, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was born on February 17, 1909, and the Commission day for Manchester Assizes was February 17, 1930. He was, therefore, too old by one day to be sentenced to detention in a Borstal institution. The statute requires that a person sentenced to detention must not be older than twenty-one when he is before the Court which passes sentence. [He was stopped.]

P. E. Brierley, for the Crown:

It is difficult to support this conviction without straining the language of the statute, but, applying the doctrine of *nunc pro tunc*, the relevant age to be considered by the

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Court which passes sentence is the age of the defendant at the date of conviction.

It is further submitted that the words "not more than twenty-one years of age" may mean under the age of twenty-two years. The language of numerous statutes implies a distinction between a person of a given age and one above that age. It may sometimes be that a person is considered of the age of twenty-one and not more only on the day on which he attains twenty-one, but in other cases the words of the statutes imply that he is of a certain age for a year after he attains that age, *e.g.*, in 8 Edw. 7, c. 67, the Children Act, 1908, s. 58, sub-s. 3, and s. 59, "of the age of twelve or thirteen years" is equivalent to "young person" defined in section 131 as being "fourteen years of age or upwards and under the age of sixteen years." Also in the Criminal Law Amendment Act, 1922, 12 & 13 Geo. 5, c. 56, s. 2, the words "of twenty-three years or under" have been held by Courts of first instance to mean under twenty-four.

THE LORD CHIEF JUSTICE: The facts show that the appellant, according to his birth certificate, was born on February 17, 1909. He, therefore, completed twenty-one years on February 16, 1930. His conviction at petty sessions was on January 22, 1930, but the Commission day for Manchester Assizes was on February 17, 1930, and in fact sentence was passed on February 18, 1930. It is perfectly obvious, therefore, that on the Commission day of the assizes he was more than twenty-one years of age, namely, one day more, and on the day when sentence was passed two days more. The statute provides that a person may be committed to quarter sessions or assizes for the purpose of being sentenced to detention in a Borstal institution "if it appears to the Court that the offender is not less than sixteen nor more than twenty-one years of age," and the question which the Court of assize, where the case has been

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remitted to assizes, has to determine is whether "the offender is of such age as aforesaid." Counsel for the Crown has put forward an ingenious argument, but two serious difficulties stand in his way. The first is to convince us that "not more than twenty-one years of age" means "not so much more than twenty-one," and the second is to convince us that, in a proper case, "is" means "was." If those difficulties could have been surmounted, our decision might have been different. There is much to be said for the view that the statute might well have been framed somewhat differently, but that is a matter for separate inquiry. We have no doubt that the appellant was above the age prescribed by the statute, and he must, therefore, be denied the benefits of Borstal, and must, instead, go to prison for six months in the second division. That sentence will run from the Commission day of Manchester Assizes.

Sentence varied.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, MR. JUSTICE SWIFT, MR. JUSTICE BRANSON AND MR. JUSTICE FINLAY.

GEORGE FRATSON.

1930.
24 *March.*

Fresh Evidence.

Reference by the Home Secretary.

Appellant was convicted of murder at Manchester Assizes on July 9, 1929, and was sentenced to death by Macnaghten, J. An appeal against conviction was dismissed by the Court on July 30, 1929.

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GEORGE FRATSON.

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Harry Allan, for appellant who was present, referred to evidence given by Inspector Batley, chief inspector of the finger-print bureau at Scotland Yard, on the hearing of the first appeal.

The inspector had then stated that a blood-stain on a piece of cardboard found on the premises of the murdered man bore an impression, which might be a finger or thumb print, but if so, was not the finger or thumb print of appellant; it might, however, have been made by a palmar surface. Since that date the palmar impression of each of appellant's hands had been taken, and he asked for leave to call Inspector Battley again.

Leave was granted, and the Inspector stated that the impression was not caused by any part of appellant's hands. He thought the print had been made when the blood was fresh.

Cross-examined by *Hemmerde, K.C.*, who (with *P. R. Barry*) appeared for the Crown, witness said that he leant to the view that the impression was made by the hand of a police-sergeant who visited the premises for the purpose of investigating the case.

It was further urged on behalf of appellant that a raincoat belonging to appellant and sold by him shortly after the murder, and subsequently recovered by the police and analysed for traces of blood, should have been tendered in evidence by the Crown at the trial. The analysis had revealed no traces of blood.

THE LORD CHIEF JUSTICE: The effect of the piece of cardboard on the appellant's case appears to be nothing at all. The matter is purely negative, and could not be important except on the unproved assumption that nobody other than the appellant was concerned in the commission of the crime.

With regard to the raincoat, there was no evidence that the appellant was wearing it at the time of the murder, nor,

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indeed, did he himself suggest that he was. Even if the medical evidence called for the Crown at the trial was correct in expressing the opinion that bloodstains would have appeared on the coat if worn by the murderer at the time of the murder, it is quite clear that those stains could easily have been removed. Moreover, it was not in the least necessary to assume that the appellant was the only person concerned in the murder. He had himself stated that another man had taken part.

These matters being disposed of, the case stands where it did in July last. The jury, on sufficient evidence, after a proper direction from the judge, arrived at a verdict of Guilty. There were, moreover, some unexpected and very striking corroborations of the appellant's own statements which could not leave any reasonable doubt of his guilt.

Appeal dismissed.

Solicitor—W. Holland, Manchester, for appellant.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

JOHN McGUIRE.

1930.
24 *March.*

Chattels in Possession of Prisoner alleged to have been Stolen but not charged in Indictment—Misdirection.

On a charge of knowingly receiving stolen goods it is imperative that the jury should be directed that the larceny implied must be proved.

Appeal against conviction by leave of the Court.

Appellant was convicted of receiving stolen goods at

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JOHN McGUIRE.

Hewart, L.C.J., Avory, J., Branson, J.

Glamorganshire Sessions on January 7, 1930, and was sentenced by the Chairman to nine months imprisonment with hard labour.

Arthian Davies, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present, was not called on to argue.

May G. Williams, for the Crown, did not seek to support the conviction.

THE LORD CHIEF JUSTICE: The only evidence which in any way approached the indictment was that the appellant appeared at one time to have been in possession of two keys, which were not named in the indictment, but which were said by the person whose property was named in the indictment to have been stolen. The primary charge was one of breaking and entering certain offices. There was a further charge of stealing and receiving certain goods, but nowhere were any keys mentioned among the property said to have been stolen.

The Chairman said to the jury: "If you have decided to find the accused not guilty of breaking and entering, you are entitled to find him guilty of receiving," but nowhere was it explained to the jury that, before they could convict of receiving stolen property, they must be satisfied that some part of the property stolen must at some time have been in the appellant's possession. If that observation had been made and that test had been applied, the jury would have seen that they were being invited to convict a man of receiving property which was not said to have been stolen and which was not referred to in the indictment.

The conviction cannot stand and must be quashed.

Conviction quashed.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

WILLIAM CYRIL DAVIES.

1930.
31 *March.*

Direction—Accomplice—Corroboration—Verbal Precision.

Even though a summing-up omits express direction on the relation of accomplices to corroboration of their evidence, the Court may, if it is satisfied that throughout the trial it has been made clear that the issue is whether the testimony of accomplices is adequately confirmed by that of other witnesses, decline to quash a conviction.

Proviso to section 4 of the Criminal Appeal Act applied.

Appeal against conviction and sentence.

Appellant was convicted at the Central Criminal Court on February 18, 1930, of corruptly accepting a gift, contrary to section 1 of the Prevention of Corruption Act, 1906, and was sentenced by Talbot, J., to eighteen months' imprisonment in the second division.

H. D. Roome, for appellant:

Appellant was an examiner in bankruptcy. On January 30, 1929, one Gambadelli was adjudicated bankrupt, and appellant became examiner in his case. On November 1 the bankrupt was served with a summons which charged him with certain criminal offences, the hearing being fixed for November 14. Appellant was an essential witness in the case. On November 7 a trap was laid for the appellant. A detective inspector handed ten £1 notes to the bankrupt's wife in order that if appellant called at her premises she might hand them to him. Appellant did call that evening and inquired for Mr. Gambadelli. Mrs. Gambadelli handed him the notes in an unsealed envelope, which appellant put into his pocket without looking at it. Mr. Gambadelli then came on the scene, and appellant was preparing to leave the premises with him when he was arrested by the detective

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who had been present all the time, though he was unable to hear some conversation that passed between Mrs. Gambadelli and appellant. Appellant told the detective that he did not know what was in the envelope, and added "she gave it me to give to a gentleman." At the trial the jury acquitted on four counts where the charges rested on the evidence of Mr. and Mrs. Gambadelli only, but convicted on the fifth count relating to this incident of November 7. This was a case where corroboration was plainly essential and where a clear direction and warning on the evidence of accomplices was required. The summing-up never mentioned the words "accomplice" or "corroboration." The jury may well have thought that there was sufficient corroboration when the detective said that he saw the envelope pass. The jury were never told that Mr. and Mrs. Gambadelli were witnesses requiring special corroboration.

Eustace Fulton, for the Crown:

It is quite plain that the judge did not in his summing-up describe these witnesses as accomplices, but it is equally clear that, throughout its course, the case turned on the question whether they were corroborated. There was abundant corroborative evidence which implicated the accused.

THE LORD CHIEF JUSTICE: The jury acquitted the appellant on all four counts in the indictment where the case for the prosecution depended on the evidence of Mr. and Mrs. Gambadelli alone, but convicted on the fifth count which charged the receiving of a particular sum of £10. The question for us is whether the conviction ought to stand. It has been strongly urged that the summing-up, unexceptionable as it is in all other respects, exhibits the flaw of omitting an express direction on the position of accomplices and the need of corroboration of their testimony —a direction following the lines so clearly laid down in BASKERVILLE, [1916] 2 K. B. 658; 86 L. J. K. B. 28; 25

Cox C. C. 524; 115 L. T. 453; 80 J. P. 446; 60 S. J. 690; 12 Cr. App. R. 81. That direction is, undoubtedly, not to be found in this summing-up. I doubt whether the word "accomplice" is to be found; the word "corroboration" does not occur, though the word "confirmation" does. But it is said by counsel for the Crown that, from first to last, the case was conducted on the footing that the issue was whether the evidence of the bankrupt and his wife was confirmed by other evidence, and indeed it is expressly admitted by appellant's counsel that counsel who appeared for the appellant at the trial did refer to the position of these witnesses as accomplices. The omission of an express direction on the position of accomplices is, undoubtedly, a matter for regret. One can only suppose that the judge omitted it because he felt that, in view of the whole course of the trial, such a direction would be superfluous. The fact remains that the direction does not appear and the question for us is whether, in these circumstances, the verdict of guilty on the fifth count amounts to a substantial miscarriage of justice—or, in other words, whether it is clear that the jury would inevitably have arrived at the same conclusion upon that count, if an express direction on the lines laid down in BASKERVILLE had been given. [His Lordship referred to the evidence and continued:] The Court is satisfied that, however explicit the direction on those lines had been, the jury could not have arrived at any conclusion other than that to which they came. There is no reason, therefore, for interfering with this conviction.

Appeal dismissed.

Solicitors—Garland Wells & Co., for appellant.

T. R. F. B.

The Court (The Lord Chief Justice, Mr. Justice Avory and Mr. Justice Branson) also sat on April 1.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE BRANSON AND MR. JUSTICE FINLAY.

1930.
7 *April*,

WILLIAM HENRY PODMORE.

Entries in Books belonging to murdered man in his Possession at death—Documents found near the body—Admissibility of Evidence—Inadmissible to prove Truth of the Written Statements.

Contents of documents found near the body of a murdered man and belonging to him held to be admissible in evidence on a trial for the homicide as being evidence of the surrounding circumstances.

Appeal against conviction.

Appellant was convicted on March 8, 1930, before the Lord Chief Justice at Winchester Assizes of murder and was sentenced to death.

du Parcq, K.C. (*T. R. C. Goff* with him), for the appellant, who was present:

The grounds of appeal are: 1. Evidence was admitted at the trial which ought not to have been admitted. 2. There were matters with which the summing-up ought to have dealt and did not. 3. The summing-up did not deal with one point in the light in which it ought to have been treated. Appellant obtained work at a garage in Southampton toward the end of October, 1928, with the murdered man, Vivian Messiter. The case for the Crown was that appellant murdered Messiter on or about October 30, 1928. The Crown put forward as a motive for the crime the suggestion that appellant had been defrauding the dead man by representing that he had received certain orders for oil upon which he was entitled to commission, the fact being that the persons who were alleged to have given the orders did not exist. Messiter's body was undiscovered from the end of October, 1928, until January 10, 1929, and appellant's defence was that he left his employment with Messiter not

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knowing of the murder of which he heard only after the body had been discovered on January 10. On January 10 the garage was entered, Messiter's body was found and near it on the front seat of Messiter's motor car there was a receipt book from which a page had been torn and an invoice book from which pages had been torn. From indentations in the first and from carbon sheets in the second the Crown sought to prove that entries were made on the missing pages in Messiter's handwriting and were records of bogus transactions which appellant had caused the deceased to make by representing that they were *bona fide* deals upon which the appellant was entitled to commission. This is a case in which inadmissible evidence was of great weight. By admitting cumulative evidence of great weight of bogus transactions, and of bogus names and evidence that appellant *might* have come to know of the bogus names the learned Judge was confusing weight with admissibility. *Prima facie* evidence of entries made by a deceased person are inadmissible. Such entries might be admissible on two grounds: (1) when made in the course of duty; (2) when made against the maker's interest. These are the only exceptions under which this evidence could be brought. With regard to (1) there must be evidence *aliunde* that the person making the entry was under a duty to some third party to make it. Here there was no evidence to show that Messiter was under any such duty. Therefore it is impossible to say that the entries were made in the course of duty: BRIGHT *v.* LEGERTON, 29 L. J. Ch. 852; 2 De G. F. & J. 606; 6 Jur. (N.S.) 1179; 8 W. R. 678: 1869. Entries relating to something which has been ascertained as distinguished from something which has been done by the deceased are inadmissible: PRICE *v.* TORRINGTON, 1 Salk. 285; Holt K. B. 300; 2 Ld. Raymond 873: 1703; SMITH *v.* BLAKEY, L. R. 2 Q. B. 325; 8 B. & S. 157; 36 L. J. Q. B. 156; 15 W. R. 492: 1867; POLINI *v.* GRAY, 12 Ch. D. 411; 22 W. R. 255; 49 L. J. Ch. 41; 40 L. T. 861; 28 W. R. 336: 1874, 1885. With regard to (2) the

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entry must be wholly against the interest of the person making it and not partly against his interest and partly in his interest. Assuming that Messiter was an agent for a third party, as alleged by the Crown, the entry in the invoice book would be partly against his interest as showing that commission was due to the appellant but it would also be in his interest as showing that commission was due to him himself from his principals: MASSEY *v.* ALLEN, 13 Ch. D. 558; 49 L. J. Ch. 76; 41 L. T. 788; 28 W. R. 212: 1880; WARD *v.* PITT & Co., 1913, 2 K. B. 130, C. A.; R. *v.* INHABITANTS OF WORTH, 4 Q. B. 132; 3 G. & D. 376; 12 L. J. Q. B. 144; 7 Jur. 172: 1843. A document was admitted which ought not to have been admitted. This was a letter from Messiter addressed to appellant. It could not be assumed that it had ever reached appellant, as the place in which it was found was frequented both by the writer and the addressee. With regard to the summing-up matters were passed over in silence which should have been urged against the probability of appellant having committed the murder. One point was put against appellant which viewed in the proper light was a point in his favour.

AVORY, J.: The Court only wishes to hear the Crown on the question of admission of evidence.

Sir Thomas Inskip, K.C. (*J. G. Trapnell* with him) for the Crown:

The evidence is admissible as: 1. Evidence of the circumstances in which the body was found. 2. As evidence that writing had been made in the two books and that leaves had been torn out. The admissibility and the weight of evidence are different questions. The only question was about the value of the indentations and of the writing on the carbons as evidence to be submitted to the jury of what had been written in the two books. The evidence is admissible not because it is evidence of the truth of the statements made, but as evidence of the fact that the entries were made and that the leaves had been torn out by the appel-

lant. Anything found in the garage where the body was found was evidence of the surrounding circumstances. The authorities cited deal only with the admissibility of documents as proof of the truth of the statements they contain. Here I do not attempt to support the admission of these documents on the ground that the entries which they contain were made against interest or in the course of duty. The letter from Messiter to appellant is admissible also as part of the surrounding circumstances of the crime.

AVORY, J.: This appellant was convicted, on March 8 of this year after a trial lasting six days, of the murder of Vivian Messiter, who was carrying on business in some capacity with the Wolf's Head Oil Company at Grove Street, Southampton. There was ample evidence before the jury on which they might conclude that deceased was murdered on the morning of October 30, 1928, by being struck from behind with great violence with a hammer found close to the body. The body was not discovered until January 10, 1929. Upon that day the garage was forced open by a representative of the Wolf's Head Oil Company who then discovered the body of the dead man, close beside it the hammer and upon the seat of the deceased's motor car two books, one an exercise book, the other an invoice book. In the exercise book afterwards was found evidence of a document signed by the appellant—a receipt for commission of 2s. 6d. on oil sold to a firm named Cromer & Bartlett. It was essentially for the jury to decide whether this was a document signed by appellant. In the invoice book it was also discovered that pages were missing, but carbon sheets were left bearing the impression of invoices—one an invoice of oil sold to Cromer & Bartlett, and other impressions of invoices of oil sold to firms which did not exist. The position in which these books were found was not a usual one for such books to be.

It has been submitted on behalf of the appellant that the

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evidence contained in the exercise book and on the carbon sheets found in the invoice book was not admissible on any ground.

If there were no other grounds upon which the evidence in the exercise book and on the carbons could have been admitted it would have been necessary to consider further whether it could have been admitted upon either of the two grounds discussed by counsel for appellant. But this evidence is admissible as part of the surrounding circumstances of this case and the jury was therefore entitled to consider these facts and whether they were consistent with the theory of the Crown that on October 30, 1928, the deceased had discovered that the transactions recorded in the exercise book and invoice book were fictitious, that some altercation had arisen between him and the appellant which had led to appellant's taking up the hammer and inflicting the fatal injuries.

The evidence was admissible as part of the surrounding circumstances of the crime.

The complaints about the summing-up are the usual complaints, made with unusual persuasiveness, that the summing-up might have been more favourable to the prisoner. We have read the summing-up and have been unable to find any misdirection to the jury or any omission which would amount to a misdirection. The summing-up was an elaborate review of all the evidence and the jury was again and again warned not to convict unless they were left without any reasonable doubt of appellant's guilt. The conviction is therefore affirmed.

Appeal dismissed.

Solicitor—Messrs. Edmond O'Connor, for appellant.

I. C. D.

The Court (Avory, Branson and Finlay, JJ.) also sat on April 9 and (the Lord Chief Justice, Avory and Branson, JJ.) on April 14.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE BRANSON AND MR. JUSTICE HUMPHREYS.

HARRY WOODS.

1930.
29 *April.*

Letters suggesting Immorality—Gross Indecency with a Male—Writer pretending to be a Female—Intent—Attempt—Preparation to commit Crime.

An indictment for attempt to commit a crime cannot be sustained by proof of acts remotely and not immediately connected with the full offence.

EAGLETON, Dears. C. C. 515, and H. ROBINSON, 11 Cr. App. R. 124, followed.

A summing-up in such a case should distinguish between intent and preparation to commit a crime and the attempt to commit it.

Appeal against conviction by leave of the Court.

Appellant was convicted of an attempt to procure the commission of an act of gross indecency, under section 11 of the Criminal Law Amendment Act, 1885, at Winchester Assizes on February 28, 1930, and was sentenced by the Lord Chief Justice to fifteen months' hard labour.

Seymour Collins, for the appellant (under section 10 of the Criminal Appeal Act, 1907) who was present:

I shall assume for the purposes of my argument that appellant wrote the two letters upon which the prosecution was founded. A young man, Johann Schaus, advertised for employment; he received in reply the two letters in question. They were indecent in character, but purported to be written by a woman. At the trial Schaus admitted that all through the proceedings he had been under the impression that the letters were in fact written by a woman. Before appellant could have been guilty of an attempt to procure he would have had 1. To disclose his true identity;

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2. To arrange a meeting. The learned Lord Chief Justice did not distinguish in his summing-up between an intention to procure and an attempt to procure: EAGLETON, Dears. C. C. 515; 3 C. L. R. 1145; 24 L. J. M. C. 158; 1 Jur. (N.S.) 940; 4 W. R. 17; 6 Cox C. C. 559: 1855; ROBINSON, 1915, 2 K. B. 342; 84 L. J. K. B. 1149; 113 L. T. 379; 79 J. P. 303; 24 Cox C. C. 726; 59 S. J. 366; 31 T. L. R. 313; 11 Cr. App. R. 124: *c. q.*; RANSFORD, 31 L. T. 488; 13 Cox C. C. 9: 1874. Here there was no attempt to incite; all that appellant did was to prepare the ground for an attempt. He did not disclose his true purpose. In COPE, 16 Cr. App. R. 77; 86 J. P. 77; 66 S. J. 406; 38 T. L. R. 243: 1921, the letter in question was on its face quite colourless, but did in fact convey to the recipient the meaning of the writer. Here there was no question about the mental attitude of the recipient.

AVORY, J.: LANDOW, 109 L. T. 48; 77 J. P. 364; 23 Cox C. C. 457; 29 T. L. R. 375; 8 Cr. App. R. 218: 1913: *c. q.*, differentiates between an intention and an attempt.

W. M. Walker, for the Crown:

The point is a difficult one. In order to constitute an attempt not only an intention is necessary but an act in furtherance of that intention. Here the mere sending of the letters is a sufficiently proximate step to the procuring of the offence. Although the letters purport to come from a woman something more than normal sexual intercourse is suggested by them. If the mind of the recipient is a material element to consider, the jury could draw the inference that if the recipient was ready to indulge in certain practices with a woman then he would be of the type likely to consent to be a party in acts of gross indecency with a man: PUNCH, 20 Cr. App. R. 18: 1927: *c. q.* Here there is an actual approximate act, one of a chain which if continued in logical sequence would have led to the commission of the crime. I rely on RANSFORD and COPE: in LANDOW the Court would have upheld the conviction

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if the jury had been properly directed. Here the facts are not dissimilar in remoteness.

I. C. D.

AVORY, J.[1]: The appellant was convicted on an indictment which charged that he being a male person did attempt to procure the commission by one Johann Schaus, a male person, of an act of gross indecency with him, the appellant. For the purposes of this appeal it is assumed that two letters dated respectively January 14 and 18, 1930, were written and sent by the appellant by post from his address at Shaftesbury to Johann Schaus in London, who had advertised for a situation as hairdresser, describing himself as aged twenty, of good appearance and tall. The said letters purported to be written by a woman inviting Schaus to come to Shaftesbury to have immoral relations with her and were couched in lecherous terms, and Schaus believed when reading them that they were written by a woman. He did not go to Shaftesbury, but handed the letters to the police, and no meeting took place between him and the appellant.

At the trial the appellant denied that he was the writer of the letters, and although a submission was made at the close of the case for the prosecution that there was no case to go to the jury, the question whether the writing and sending of the letters could in point of law constitute an attempt to procure the commission of the offence charged was not directly raised, with the result that the case was left to the jury to say (1) whether the appellant was the writer of the letters, and (2) if so, did they amount to an attempt to procure the commission of the offence charged, without any direction what was necessary in law to constitute an attempt, as distinguished from mere intention

(1) This judgment is from a *verbatim* copy supplied by the courtesy of the Director of Public Prosecutions.

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to commit an offence, and the jury in convicting the appellant may have thought it sufficient if they were satisfied that the appellant intended, if the opportunity arose, to procure the commission of the offence.

The law on this subject was fully considered in the case of R. *v.* ROBINSON, 1915 2 K. B. p. 342, where the Lord Chief Justice, Lord Reading, at p. 348, said: "There is no real difficulty in formulating the principle of law which is applicable to cases of this kind. A safe guide is to be found in the statement of the law which is laid down by Baron Parke in R. *v.* EAGLETON: 'The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are.' The difficulty lies in the application of that principle to the facts of the particular case." And he proceeds, in dealing with that case of ROBINSON, to say, on p. 349: "In truth what the appellant did was preparation for the commission of a crime, not a step in the commission of it . . . there must be some act beyond mere preparation if a person is to be charged with an attempt. Applying the rule laid down by Baron Parke, we think that the appellant's act was only remotely connected with the commission of the full offence, and not immediately connected with it."

In the case of R. *v.* EAGLETON, reported in 1 Dearsly, at p. 528, upon which that judgment was founded, which was a judgment of nine judges, Baron Parke, in delivering the judgment of the Court, after saying what has been already quoted in the case of ROBINSON, proceeded: "On the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself . . . and therefore it ought to be considered as an attempt." And in the case of R. *v.* LANDOW,

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reported in 23 Cox C. C., at p. 457, Channell, J., delivering the judgment in that case of five judges, pointed out the importance of the jury being directed on the distinction between an intention to commit an offence and an attempt to commit it. He said: "This was a case in which the learned Recorder should have been particularly careful to explain to the jury what they would not otherwise easily understand, the difference between an attempt and an intention, or a mere idle threat." The Court in that case thought that the Recorder had not sufficiently explained this to the jury, and that he had probably been misled by the way in which the case was conducted in the Court below, and they accordingly quashed the conviction. The case of R. *v.* CHARLES WILLIAM COPE, which was relied upon in support of the conviction, is not in point—that case is reported in 16 Cr. App. R., at p. 77—seeing that that decision proceeded on the ground that one of the letters was in such terms that the intended recipient in that case would, in the circumstances, see in the letter an invitation to commit an act of gross indecency with a male person. The intended recipient in that case had, as was alleged, committed a like offence with an acquaintance of the accused. In the circumstances of the present case no such invitation can be implied from the letters as understood by the recipient.

Applying the law as laid down in R. *v.* ROBINSON and R. *v.* EAGLETON, we think the appellant's acts were only remotely connected with the commission of the full offence and not immediately connected with it, and that the jury should have been directed that such acts in the circumstances of this case did not in law constitute an attempt to procure the commission of the offence charged. For these reasons we think the appeal must be allowed and the conviction quashed.

Conviction quashed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TALBOT AND MR. JUSTICE FINLAY.

1930.
5 *May.*

ALFRED GREEN.

One of Several Charges Abandoned — Direction — Property Obtained on Representations other than those Alleged to be False.

A summing-up must not call attention to counts that have been abandoned. On an indictment for obtaining by false pretences representations which did not lead to delivery of the property must be carefully distinguished from those which did.

In dealing with intent to defraud the possibility of mistake should be considered in directing the jury.

Appeal against conviction and sentence.

Appellant was convicted at Bucks Sessions on April 8, 1930, on two charges, one of obtaining credit, and the other of obtaining money, by false pretences and was sentenced by the Deputy-Chairman to six months' imprisonment in the second division.

T. J. Phillips, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

There were three charges against the appellant. A charge of obtaining £4 from one Smith by false pretences was abandoned by the prosecution. Appellant was convicted of obtaining credit from a Mrs. Aspee by false pretences or by means of fraud other than false pretences, and of obtaining £2 from a Mr. Purdie by false pretences. It is submitted that the summing-up was unsatisfactory. In the former case, which was dealt with as one of false pretences, the jury were invited to consider the evidence relating to the abandoned charge as likely to throw light on the prisoner's state of mind; and in the latter case, the

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jury would infer from the summing-up that it was for the prisoner to satisfy them that there was no intent to defraud. [He was stopped.]

C. K. Tatham, for the Crown:

There were several unfortunate observations in the course of the summing-up, but it is submitted that, having regard to the course which the case took and the evidence as laid before the jury, these cannot have influenced the verdict. The evidence of Smith, which was referred to by the Deputy-Chairman and which the jury would have in mind, was not detrimental to appellant.

THE LORD CHIEF JUSTICE: One cannot fail to observe that, although the second charge had been abandoned by the prosecution, the Deputy-Chairman said this in his summing-up: "You will remember that in the second charge with regard to Smith there was no evidence to support the charge of false pretences and the prosecution have, very wisely I think, decided to drop that charge. It is useful, however, in dealing with the case of Mrs. Aspee to bear in mind the case of Smith only to decide in your own minds what kind of conduct this man Green was guilty of. You are not allowed to bring into your consideration similar offences unless they happened about the same time. You cannot deal with matters over a series of years, but you may consider those of a short time before to arrive at a conclusion whether you believe prisoner's conduct was due to a mistake or accident." There is not much room for doubt with regard to the meaning likely to be conveyed to the jury by those words. They seem clearly to indicate that that conduct, having happened within so recent a time, might be considered by the jury when they came to ask themselves what was the true nature of the acts alleged in the other charges. That unfortunate incident would be sufficient in itself, but it is not the only one. It is quite true that the first count of the indictment charged the

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obtaining of credit by false pretences or by fraud other than false pretences, but in substance the matter was treated as a charge of false pretences alone. Before the crucial time had arrived, Mrs. Aspee had found that the representations made by the appellant were untrue, and she no longer relied on them. It is conceivable that, if there had been a proper direction, the jury might have convicted the appellant of obtaining credit by fraud other than false pretences on that count, but the matter is one which required very careful explanation.

With regard to the third charge, the summing-up is silent on the possibility of mistake on the part of the appellant and the manner in which "intent to defraud" was introduced may well have conveyed to the jury a wrong impression with regard to the burden of proof. These, however, are minor matters—the most serious matter is that the jury were invited to look at the evidence relating to the charge which had been dropped to throw light on the question of the guilt of the appellant on the other charges. The argument for the Crown is that that passage in the summing-up really did not matter, because the jury had heard the evidence and there was nothing in the abandoned charge to inculpate the accused. That seems to make the matter worse; because, if that be so, the jury were asked to look for guilt, where *ex concessis* there was innocence, and to derive from the abandoned charge help with regard to the charges which were not abandoned.

We cannot say that the jury must have come to the conclusion to which they came if the summing-up had been sufficient and proper; and the result is that the appeal must be allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

The Court (Avory, Talbot and Finlay, JJ.) also sat on May 19.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE TALBOT.

WILLIAM BATES.

1930.
26 *May.*

Prevention of Crimes Act, 34 & 35 Vict. c. 112, ss. 7 and 20— Offences not within Section 20.

Attempted burglary is not a " crime " within section 20 of 34 & 35 Vict. c. 112, the Prevention of Crimes Act, 1871.

Appeal against conviction, on certificate.

Appellant was convicted at Southampton Borough Sessions on April 26, 1930, of an offence against section 7 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), and was sentenced by the Recorder to twelve months imprisonment with hard labour.

No counsel appeared for the appellant, who was not present.

J. Scott Henderson, for the Crown, did not seek to support the conviction.

AVORY, J.: The indictment charged the appellant with waiting for an opportunity to commit an offence, contrary to section 7 of the Prevention of Crimes Act, 1871, the particulars being that he on April 12, 1926, at the Quarter Sessions for the County of Lancaster was convicted on indictment of a crime and that a previous conviction for crime was then and there proved against him, and that after those previous convictions he on February 21, 1930, in the county borough of Southampton was found in a public place waiting for an opportunity to commit an offence. Evidence was given by a police officer that the accused had been convicted at the Quarter Sessions for

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Lancaster on April 12, 1926, on indictment of the offence of attempted burglary and the certificate of that conviction was produced. The other condition of the statute was satisfied, in that it appeared that a previous conviction had been proved against him at that time. The statute [section 20] expressly defines crime as including "any felony" and certain specified misdemeanours, but an attempt to commit burglary is not one of the misdemeanours specified. The offence, therefore, of which the appellant had been convicted is not a "crime" within the meaning of the statute, but unfortunately that point was not brought to the attention of the Recorder. Whether he did not in fact notice the certificate or whether he did not correctly hear what the police officer said in giving evidence, it is clear he treated the conviction as one of burglary. On his attention being subsequently called to this, he himself granted a certificate for appeal to this Court.

In these circumstances it is clear that this conviction cannot stand.

Conviction quashed.

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GEORGE AMON EBBAGE.

Avory, J.,
Swift, J.,
Talbot, J.

GEORGE AMON EBBAGE.

Larceny—Receiving with Knowledge—Joint Indictment.

A summing-up must distinguish clearly between the charge of larceny and that of knowingly receiving, and, if there is more than one defendant, between their respective shares in the offences alleged.

Appeal against conviction and sentence.

Appellant was convicted of larceny at Norwich City Sessions on May 5, 1930, and was sentenced by the Deputy-Recorder to three years' detention in a Borstal institution.

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GEORGE AMON EBBAGE.

Avory, J.,
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E. J. C. Neep, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

There was no count in the indictment for receiving, and the evidence did not disclose a case of larceny against the appellant. He was in the company of a man named Hunt, who committed the larceny, but the jury were never told to consider whether appellant was a party to the larceny.

A. S. Leighton, for the Crown:

There was some evidence that the appellant and Hunt were acting in concert together, but it is conceded that the jury did not receive adequate direction on this point.

AVORY, J.: If there had been in this indictment the usual count for receiving the property well knowing it to have been stolen, it is possible that the appellant would have been convicted of receiving. Looking at the summing-up, we find that the Deputy-Recorder treated it as a matter of course, that if the jury thought the property was stolen, there could be no difference between the case of the appellant and the case of Hunt. It ought to have been pointed out to the jury that, before they could convict the appellant of larceny, they must be satisfied that he was a party to the actual stealing.

In these circumstances the appeal must be allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE TALBOT AND MR. JUSTICE HUMPHREYS.

1930.
2 *June.*

DANIEL KENNEALLY.

Prisoner Insane but not so Found—Application treated as Final Appeal.

Severity of sentence in case of a prisoner certified insane after conviction.

Application for leave to appeal against sentence referred to the Court by Humphreys, J.

Applicant pleaded guilty to wounding with intent to murder at the Central Criminal Court, on May 2, and was sentenced by Swift, J., to ten years' penal servitude.

Applicant was not present.

AVORY, J.: Applicant pleaded guilty at the Central Criminal Court to wounding with intent to murder a fellow workman, one Arthur Bromfield. The offence was committed at the brewery where appellant had been employed for ten years; he was a man of good character and those present at the time of the wounding had no doubt that appellant was mad. The medical officer at the prison has, since the conviction, certified that appellant is insane (as the judge at the trial thought) and suffering from delusions. Applicant at the time of inflicting the wounds said: "I have had news of my father's death and this man killed him: and now I have killed him; am I not right?" In fact applicant's father was not dead and the whole thing was a delusion. In these circumstances applicant was represented by counsel at the trial and was advised by him to withdraw his plea of "not guilty" and to plead "guilty," in view possibly of the rule of MCNAGHTEN'S CASE about delusions.

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Since the trial applicant has, however, been certified as insane and been removed to an asylum and we have had anxiously to consider whether this sentence of ten years' penal servitude should stand. If it does and applicant is cured and discharged from the asylum he would be liable to be sent back to prison to serve his sentence of penal servitude. Therefore we have decided to reduce the sentence to one of three years' penal servitude and in making that reduction we have ascertained that the Director of Public Prosecutions does not wish to be represented nor to oppose the reduction.

Sentence reduced.

I. D.

GRAHAM WOOD.

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GRAHAM WOOD.

Avory, J.,
Talbot, J.,
Humphreys, J.

Youthful Offender—No Previous Conviction.

Severity of sentence.

Appeal against sentence.

Appellant, who was nineteen years and two months old, was convicted at the Hants (Winchester) Sessions on April 15 of shop breaking and was sentenced by the Chairman to two years in a Borstal Institution.

Appellant, who was not represented, was present.

The Court, in view of the fact that appellant had no previous convictions and that his sister had come forward and offered him a home, released him on his own recognisances and bound him over to be of good behaviour for two years.

Sentence reduced.

I. D.

1930.
2 *June.*

GEORGE HILL.

Avory, J.,
Talbot, J.,
Humphreys,
J.

GEORGE HILL.

Obtaining Credit by Fraud—Admission of Evidence on Counts for Larceny by a Trick—"System"—Direction on Other Transactions—Joinder of Counts.

It is a misdirection, on a charge of obtaining credit by fraud, that the jury may consider other cases of alleged stealing, which have not been established in evidence.

Remarks on joinder of counts under Indictment Rule 3, 1915.

Appeal against conviction, on certificate.

Appellant was convicted on May 7 at Birmingham City Sessions of obtaining credit by fraud and was sentenced by the Assistant-Recorder to twelve months' and six months' imprisonment with hard labour to run consecutively.

A. R. Churchill, for the appellant who was present.
Elwes, for the Crown.

Churchill:

The appellant was originally indicted on six counts, two for larceny of two horses by a trick, two for receiving the same, and two for obtaining credit by fraud on two transactions concerning potatoes and a garden roller respectively.

The prosecution, in opening the case, withdrew the receiving counts, but proceeded upon the remaining four counts.

At the conclusion of the case for the prosecution I submitted that there was no case on the two larceny counts, and the learned Assistant-Recorder so ruled; but he allowed the prosecution to use the evidence tendered thereon as evidence of "system" with regard to the remaining counts of obtaining credit by fraud.

This was wrong, first, because evidence of "system" is only allowed where the evidence sought to be used as

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such is evidence of a similar crime. Here the crime was different. Secondly, evidence of a felony cannot be used as evidence to prove a misdemeanour. Thirdly, the summing-up gave no clear direction to the jury for what purpose such evidence was admitted, but on the contrary confused the issues and might have induced the jury to believe that they could take into account other transactions of appellant generally without any specific *nexus* between them being indicated.

AVORY, J.: The appellant George Hill was convicted at Birmingham City Quarter Sessions before the learned Assistant-Recorder on two counts of an indictment which charged him with obtaining credit by fraud under section 13 of the Debtors Act of 1869 (32 & 33 Vict. c. 62) and was sentenced to twelve months' hard labour on one count and to six months' hard labour on another count to run consecutively and he now appeals against conviction on a point of law which the learned Assistant-Recorder has certified as a proper one for this Court.

In the first place the indictment was improperly framed in that counts charging the appellant with felonies (larceny) and receiving in regard to two horses were joined with the two counts for misdemeanours upon two of which the appellant was subsequently found guilty. Under rule 3 of the Indictments Act of 1915 (5 & 6 Geo. 5, c. 90), such a joinder is allowed only if the charges "are founded on the same facts or form or are a part of a series of offences of the same or a similar character." The charges relating to the horses are on the face of them not founded on the same facts nor are they of a similar nature. No objection having been taken to the indictment the trial proceeded and at the close of the evidence a submission was made regarding the counts relating to the alleged horse-stealing and the learned Assistant-Recorder ruled that there was no evidence to support these charges.

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The question then arose whether the evidence relating to the horses was admissible on the remaining charges of obtaining credit by fraud. After some discussion the learned Assistant-Recorder held that, in some way which is not clear, this evidence might be admitted. In the summing-up the attention of the jury was directed to the two cases of obtaining credit by fraud but the learned Assistant-Recorder introduced the evidence relating to these charges by some general observations, one such observation being that the evidence regarding the horses was admissible because the jury were entitled to look at the surrounding circumstances and appellant's conduct "on other occasions." These are misleading remarks to make to a jury. The only ground upon which, once it was ascertained that the larceny charges respecting the horses could not be sustained, evidence concerning the horses could have been considered, was that the appellant was attempting, in his transactions concerning them, to obtain credit by fraud. There was no direction to the jury on these lines and the jury probably took into account the fact that the horses had not been paid for. In these circumstances we find that there was a misdirection of the jury and that the appeal must be allowed and the conviction quashed.

Conviction quashed.

I. D.

Solicitors—Messrs. Arthur Hall, Wright & Son, Birmingham, for appellant.

JOHN CURRAN.

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JOHN CURRAN.

Avory, J.,
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Humphreys, J.

Youth Previously Convicted—Imprisonment.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on May 1 of larceny and shop-breaking at the Central Criminal Court and was sentenced by the learned Commissioner to twenty months' imprisonment with hard labour.

Appellant was present.

AVORY, J.: At the time of the trial appellant gave his age as twenty-two and although the police stated that his date of birth was September 28, 1910, appellant insisted that he was twenty-two years of age. Whether that was done with a view to avoiding being sent to Borstal or for some other motive is not known. He has now repented his untruth and has submitted his certificate of birth and he now asks to be sent to Borstal. Although the offences of which he was convicted are very serious ones and although he has been convicted before and sentenced to six months' imprisonment we have a favourable report from the Prison Commissioners and are prepared to change his sentence to one of three years in a Borstal Institution.

Sentence reduced.

I. D.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE TALBOT AND MR. JUSTICE HUMPHREYS.

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17 *June.*

JAMES CLARKE.

Document by Police Officer supplied to Superior—Production at Trial—Cross-examination by Defence—Document not put in at Trial produced to the Court.

A defendant is entitled to see a written description of himself given by a police officer to his superior, with a view to cross-examining that officer on alleged discrepancies between the contents of that document and his sworn testimony.

The proviso to section 4 of the Criminal Appeal Act applied.

Appeal against conviction by leave of the Court.

Appellant was convicted on April 23 at the Saffron Walden Quarter Sessions of burglary and was sentenced by the Recorder to twelve months' imprisonment with hard labour. The defence was an *alibi*.

The facts sufficiently appear from the judgment.

D. Curtis Bennett, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

At the trial I was desirous of cross-examining a police officer whether the identifying witnesses had given a different description of the alleged burglar to that which they had given at the trial and asked prosecuting counsel for the descriptions given in writing to the police. Prosecuting counsel objected that they could not be put in as evidence and eventually said that I might see them "at my peril." I, fearing that the production of the documents, which were in fact handed to me, might disclose appellant's previous

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convictions which were numerous, did not look at them or attempt to use them in any way.

One ground of appeal is that the underlying threat contained in the words "at your peril" so impeded the conduct of the defence as to make the trial unsatisfactory.

[AVORY, J.: Why did you not look at the documents and cross-examine the witness to the effect that his description differed from his later one?]

Owing to the qualification with which they were produced.

[AVORY, J.: However improper the objection to producing them was, they were in fact produced and you could have seen them.]

[HUMPHREYS, J.: Was any explanation given of the meaning of the phrase "at your peril" used by counsel for the prosecution?]

I understood that he insisted that the whole bundle of documents he had which contained details of appellant's previous convictions must go in if the descriptions were put in.

[AVORY, J.: Having now seen the descriptions do you say that if they had been before the jury the result could have been different?]

No, I cannot.

The Court desired to hear counsel for the prosecution on his refusal to produce the documents and his claim that they were confidential.

F. D. Levy, for the Crown:

There is no form of discovery in criminal cases as in civil. I gave my friend every facility to see any documents he desired. A number of statements had been taken which dealt with photographs, etc. It would have been very harmful if the jury had been allowed to see the bundle.

[AVORY, J.: The witness was only asked about *one* description.]

I am under no obligation to hand over my brief to the

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defence. When I said I did not produce it I meant I did not put it in.

[TALBOT, J.: But you objected to the police officer being cross-examined. You objected to his being asked questions because the answer might involve a breach of police regulations.]

[AVORY, J.: The only point here was, had a witness said something on a previous occasion different from the statement he was then making. You are forgetting Lord Denman's Act which says that a witness may be asked whether he has given a different account on a previous occasion without the document upon which the cross-examination is founded being produced. The point is not whether documents were exhibits but whether they could be seen.]

I said: "If my friend says 'Will you allow me to look at those documents?' I should say 'Yes'; but if he asks me to produce them I shall refuse to produce them."

[HUMPHREYS, J.: But where was the favour? He was entitled to see them. You objected that he could not use them unless he proved the handwriting. You refused, saying, "As I appear on behalf of the Crown I must refuse."]

[AVORY, J.: But what did you mean by "If my friend calls for inadmissible confidential documents he does so at his peril"?]

I meant that I should re-examine on the documents and if he attacked my witnesses' characters I should ask questions.

[TALBOT, J.: What was "the peril"?]

I should have re-examined to show the inconsistencies in the statements that had been made.

[AVORY, J.: But that was what Mr. Curtis Bennett wanted.]

I may have been unwise to use the words "at your peril," but defendant was not prejudiced as he got what he wanted

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and made no use of it and no injustice was done. He got everything he asked for and there was in fact no material difference in the descriptions.

A. H. K.

AVORY, J.[1]: This appellant, James Clarke, was convicted at the Saffron Walden Quarter Sessions before the learned Recorder upon an indictment charging him with having committed a burglary on the night of March 4 last and stealing a large quantity of property including a number of silver articles and a number of oil paintings which had been cut from their frames, of a total value of over £200. He was sentenced to twelve months' hard labour, and he now asks for leave to appeal against conviction only. In his notice of appeal he gives the best of reasons for not appealing against the sentence on the ground that he does not wish to run the risk of its being increased, saying that this is the first time in a long career that he has had what he considers a merciful sentence.

Now this burglary having undoubtedly been committed on the night of March 4 last, and there being evidence from the footprints that two men were concerned in it, the whole question at the trial was whether the present appellant was one of those men. There was a body of evidence pointing conclusively, if the witnesses' testimony was believed, to the prisoner being one of those two men.

Shortly after the burglary had been committed, that is to say, early in the morning of March 5, about twenty-five minutes past six, Mr. Pledger, a signalman at the station at Saffron Walden, saw two men arrive at the station carrying between them a portmanteau or attaché case, and a large cardboard package, as it was described, which no doubt contained the oil paintings. They got into conversa-

(1) This judgment is printed from a *verbatim* copy supplied by the courtesy of the Director of Public Prosecutions.

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tion with the signalman about a train which they said they wanted to take to Cambridge, and he was with them altogether for about ten minutes. He subsequently identified the appellant as one of the two men, being the taller of the two. Another witness, who was bicycling early that morning in Saffron Walden, saw two men carrying parcels or suit cases, and he noticed that the taller of the two men turned, so that he had an opportunity of seeing his face. About half past six Police Constable Hallums was on duty and saw two men, one carrying a small brown case and helping the other man to carry a much larger one; he followed them for a short distance, and then lost sight of them and went to the railway station and spoke to the signalman, and then went to the police station in consequence of what he heard from the signalman, got his bicycle and rode to a village called Littlebury, about one and a half miles away. About seven o'clock that morning a woman standing at her door in Littlebury saw two men, saw their faces and observed that one man was taller than the other. Another witness, at the inn at Littlebury, saw two men passing the house at seven o'clock that morning, and saw that they were carrying two cases; they spoke to him and asked whether the London omnibus passed that way. At ten minutes past seven another witness, who was walking past the "Falcon" Inn, saw two men of the same description carrying packages, and they also spoke to him about the London omnibus. The police constable by this time having arrived at Littlebury Post Office on his bicycle, came up to the same two men whom he had previously seen, carrying the same packages. He went up to them, the shorter man put his hand in his coat pocket, and the constable, thinking he might have some dangerous weapon there, took hold of his arm, but it was discovered to be only a bottle of whiskey, a square bottle which answered the description of property that had been stolen from the house. He then told the men that he wanted to know who they

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were, and the taller man, who was subsequently identified as the appellant here, said that they were travellers and wanted to get to London. The police constable told them to open these cases as he was suspicious about them, and they told him he had better do it himself; as he bent down to look at the smaller case, in which he saw a shaving brush and a magnifying glass, both of which were identified as having been stolen from the house, these two men took the opportunity of running away, leaving the packages behind them. Upon these packages being afterwards examined, they were found to contain property which had been stolen from the house in question. The police constable followed them for about four miles, and ultimately lost sight of the men at about quarter past eight, when they concealed themselves in a wood, he having had the opportunity all that time, both on the first occasion and on the second occasion and on his conversation with them, and while following them for four miles, of taking accurate account of them. There were other witnesses, particularly a man named Tredgett who was driving his lorry; about half past eleven he was stopped between Littlebury and Newport by two men who asked for a lift, and he gave them a lift to Newport, where they all went to the "Coach and Horses" Inn and had drinks together. This man, Tredgett, being with them and in their company for about twenty minutes, identified the appellant as one of the men and the taller of the two. The landlady of the "Coach and Horses" at Newport when they came in with Tredgett also had an opportunity of observing them for about fifteen minutes, and she said the appellant answered the description of the taller of the two men. After that, witnesses from a garage at Newport were called, one of whom said that two men came to the garage about 11.55 that morning and asked for a car to take them to Bishop's Stortford, and the proprietor of the garage, a Mr. Norden, drove these two men from Newport to Bishop's

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Stortford, where he arrived about 12.20 p.m.; he had during that drive an opportunity of observing them, and he also identified the appellant.

Now, in answer to this case, certain witnesses were called for the defence with a view of establishing an *alibi*. One in particular was called for the purpose of proving that at half past three that same afternoon the appellant called at the Bow Street Police Station, where he had been invited to call by a police officer; in consequence of his previous character he was under police supervision and bound to report. The evidence was clearly consistent with his having arrived in London that afternoon and making his appearance at Bow Street. The appellant makes a point in his grounds of appeal that if he had been committing a burglary the night before it was unlikely that he would show himself at a police station in the afternoon. With his previous experience, he is quite capable of executing a movement of that kind with a view to subsequently establishing what he is pleased to call an *alibi*. The other feature in the case which shows considerable ability on the part of this appellant was that the witness, Pledger, whom I have already mentioned, had said in describing the men, that he had noticed that the taller man had a scar on his neck. Having described that the scar was on the right side of the neck, the appellant, when he was at the police court, resorted to a dodge in order to confuse this witness, and he put some pink lip salve on the other side of his neck making that represent a scar; then he cross-examined the witness whether that was the scar that he saw, and then pointed out that that mark on the other side of his neck was not the one which the witness had previously described. Upon that evidence, the jury having considered the evidence given for the defence, and the learned Recorder having summed up in a manner which has not called for, and certainly has not evoked any criticism on the part of the learned counsel who appeared

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for the defence, the jury convicted, and, but for the incident to which I am about to refer, this Court would never have granted any leave to appeal in this case, because on the face of it, they were satisfied that so far as the evidence was concerned it was conclusive of the appellant's guilt; but our attention was called to the fact that during the cross-examination of one of the witnesses for the prosecution an attempt was being made by the learned counsel for the defence to show that the description which he had given at the police court of the appellant was not the same as that which he had given to his superior officer, and the description which was given at the trial was not the same as that which he had given at the police court, or given to his superior officer, and an attempt—a very proper attempt—was made by the learned counsel to get the written description which had been given to the superior police officer, for the purpose of cross-examining the witness in order to show that the evidence he was then giving did not tally with the description which he had previously given. Unfortunately, Mr. Levy, who appeared for the prosecution, took up the attitude, in the first instance, that this written description could not be produced because it was a confidential document, and that it would be contrary to the Police Regulations for the officer to produce it. It is not necessary to go again through the details of the controversy that arose upon that. The ultimate result appears to have been that the learned counsel for the defence was told that if he made use of this description he would do so "at his peril," and the result of that was that the learned counsel, fearing that there might be something in this document which would prejudice his client, did not persist, and did not, in fact, make further reference to the written description which had been given by the police officer who was then under cross-examination, or by other witnesses who had given a description. If in the result it had appeared that there was anything in those written

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descriptions which was contradictory to the evidence which was given by the police officer, or the other witnesses at the trial, or at the police court, we should have had seriously to consider whether any miscarriage of justice had been caused by this attitude which was unfortunately assumed by the learned counsel for the prosecution. We have now had the opportunity of seeing the actual documents, the written descriptions, which had been taken down from the police officer and from two other witnesses who had given a description of the present appellant, and so far from there being anything in them contradictory to the evidence which the witnesses gave at the trial, or at the police court, they appear to be substantially in accordance with their evidence, and the learned counsel, Mr. Curtis Bennett, has properly admitted that, having now seen those documents, and all intimidation having been removed from his mind, and he having carefully considered them in a calm spirit, he is quite unable to suggest that if he had read them out to the jury, or cross-examined the witness upon them, any different result would have followed.

We are satisfied, in these circumstances, while regretting that this incident should have given rise to this appeal, that there has been no miscarriage of justice in this case, and that the application for leave to appeal against the conviction must, therefore, be dismissed. There being no appeal against the sentence, it remains. As leave to appeal was given, in accordance with the ordinary rule the time will count from the date of conviction.

Appeal dismissed.

BEFORE

MR. JUSTICE HORRIDGE, MR. JUSTICE McCARDIE AND MR. JUSTICE TALBOT.

LAWRENCE JOHN CHARLES CHISWELL.

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30 *June.*

Crime Committed to Escape Military Service.

The Court will usually treat offences committed to escape military service as ordinary crimes.

Appeal against sentence.

Appellant was convicted at Winchester Sessions on April 15 of shop-breaking and office-breaking and was sentenced by the Chairman to two years' detention at Borstal.

McCARDIE, J.: The reason given by appellant for the crimes committed was a desire to escape, by reason of conviction, from further military service. It is becoming a common occurrence to commit crime to escape service. In this case there was no evidence of criminal habits or tendencies or association with persons of bad character as required by the 1908 Act, hence the Borstal sentence could not be sustained. It was the view of the Court that crimes of this nature should usually be punished as serious offences. It was not right merely to bind him over, there must be deterrent punishment to prevent repetition. The Court imposes a sentence of six months' imprisonment in the second division, sentence to commence from to-day.

Sentence varied.

N. P. G.

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SIDNEY BRIGGS.

Horridge, J.,
McCardie, J.,
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SIDNEY BRIGGS.

Joint Indictment—Discrimination between Cases—Witnesses who may be Accomplices — Corroboration — Witness in Court before giving Evidence.

When one joint defendant pleads guilty to two larcenies, the summing-up must not assume against another only indicted in respect of one that he is implicated.

A witness who has been present at the proceedings before being called is not thereby disqualified from giving evidence.

Appeal against conviction.

Appellant was convicted on April 15 at the Middlesex Sessions of larceny of a motor-car and was sentenced by the Deputy-Chairman to six month's imprisonment with hard labour.

Fulton, for the appellant, who was present:

He has an excellent character. There was a substantial *alibi*. It could have been proved by the presence of a bath-book, which recorded the receipt given to appellant by Lyons' manager (who employed him) for towels, etc., at the time when the offence was committed. The bath-book was not produced on the first day's hearing though the manager was present in court who could have proved the book. This witness was not allowed to be called, the learned Deputy holding that the fact that he had been present in court during the trial made his evidence inadmissible. [He was stopped by the Court.]

Raphael, for the Crown:

The defence was in no way prejudiced by the exclusion of evidence on the first day because on the resumed hearing evidence was tendered by the defence and admitted which, according to defendant's counsel, was of the same effect as that which had been excluded.

[HORRIDGE, J.: The defence lost the benefit of the

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manager's evidence. The witness on the second day is not the same person and does not give the same evidence.]

The question of larceny or mere "joy-riding" was only a secondary issue. The substantial question was whether the *alibi* of defendant was true and it was to that issue that the learned Deputy-Chairman mainly directed the attention of the jury.

HORRIDGE, J.: In this case both the conduct of the trial and the summing-up were impeached. It was a mistake to exclude the evidence of the manager from whose custody the book has been produced to-day. Then the learned Deputy-Chairman omitted to point out to the jury that the only evidence against the appellant was in respect of one of the two stolen cars, in respect of both of which a defendant jointly indicted had pleaded guilty: he was not entitled to conclude against the appellant that either car was stolen. In another important respect, too, the learned Deputy-Chairman had failed to discriminate between the two men: appellant had not been identified by the police as one of the occupants of one of the cars, as the other defendant had been: and he was only identified by two girls who alleged that they were merely "joy-riders" on the same car.

The trial was unsatisfactory and the appeal must be allowed.

Conviction quashed.

Solicitors—Vyvyan Wells, Finchley, for appellant; Wohtner & Sons, for the Crown.

N. P. G.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE TALBOT AND MR. JUSTICE MACNAGHTEN.

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14 *July.*

CYRIL BALDESSARE.

Reckless Driving—Criminal Responsibility of Passenger.

Both of two persons, in pursuit of a common purpose, may be guilty of criminal negligence by driving, although only one of them actually drives.

Appeal against conviction, by leave of the Court.

Appellant was convicted of manslaughter at the Central Criminal Court on May 6, 1930, and was sentenced by Swift, J., to twelve months' imprisonment.

Norman Parkes, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The evidence in the case was that on the evening of February 23, 1930, the appellant and a man named Chapman were riding in a motor-car and that an elderly woman was knocked down by the car and died a few days later. Both appellant and Chapman were charged with the larceny of the car, as well as with manslaughter, but were acquitted on the charge of larceny, the defence being that of a "joy-ride." The appellant was not the driver of the car, but a mere passenger in it. There was considerable evidence to show that at the time of the accident the car was being driven with criminal recklessness; the brakes were violently applied, but it proceeded some thirty yards after the impact, and the head-lights were not lighted. There was no evidence, however, to show that any of the factors of this recklessness were present for any material time before the accident. It is submitted that, assuming the two men were

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CYRIL BALDESSARE.

Hewart, L.C.J., Talbot, J., Macnaghten, J.

not guilty of larceny, there was no evidence of manslaughter against the appellant fit to be left to the jury, and that the judge misdirected the jury with regard to the law. Before they could convict of manslaughter, they would have to find that there was an agreement, express or implied, between Chapman and the appellant that Chapman should drive in a reckless manner, and there was no evidence to support this. The only reported case, where a person who was not the driver of a car, has been convicted of an offence arising out of the driving appears to be DU CROS *v.* LAMBOURNE, 1907, 1 K. B. 40; 70 J. P. 525; 76 L. J. K. B. 50; 95 L. T. 782; 23 T. L. R. 3; 5 L. G. R. 120, where an owner, who was not driving, was convicted of dangerous driving; but it is submitted that that case turned on its special facts, which were quite different from the facts of the present case.

G. G. Raphael (with him *John Maude*), for the Crown: The conviction should stand. It is sufficiently supported by the fact that it was proved that the death of the woman resulted from an unlawful expedition in which the two men were engaged.

[TALBOT, J.: Is there any case where the doctrine that death resulting from an unlawful act amounts to manslaughter has been applied to a case of pure tort?]

There does not appear to be any reported decision to that effect, and this case was left to the jury on the basis of the unlawful act being that of stealing. The act though found not to be larceny was still unlawful.

The common purpose to drive recklessly was here shown by the fact that both men were driving in a car which did not belong to them and the jury were entitled to infer that the driver was the agent of the passenger. It matters not whose hand was actually controlling the car at the time. In LONGBOTTOM AND ANOTHER, 3 Cox C. C. 439, 1849, both driver and passenger were convicted of manslaughter.

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[TALBOT, J.: The report in that case says that both prisoners were in a state of partial intoxication.]

Norman Parkes replied.

THE LORD CHIEF JUSTICE: The appellant appeals on two grounds—first, that there was no evidence on which the jury could properly convict him of manslaughter, and secondly, as he alleges, that there was misdirection in the summing-up of the learned judge. With reference to a considerable part of the case, there was no real dispute. [After stating the facts, His Lordship continued:] It is undoubtedly a cardinal fact in the case that the jury thought fit to acquit both the appellant and Chapman on the charge of stealing the car. The question, therefore, was whether, nevertheless, the two men were associated together in the driving of the car so that, when death resulted from the collision, each was guilty of manslaughter. With regard to the summing-up, we are all of opinion that this was an excellent summing-up; it stated the law clearly and fairly, and if there was any error in it, the error was in favour of the appellant. After that perfectly fair summing-up, the jury came to the conclusion that the appellant was guilty of manslaughter; in other words, they came to the conclusion that the appellant and Chapman were acting together and joined in responsibility, not merely for the taking away of the car from the owner's possession, but also for the driving of it in the way in which it was in fact driven.

The only question for this Court is whether there was any evidence on which the jury could properly find that community of purpose and action. The matter was very carefully argued before us, and we have very carefully considered it, and our conclusion is that we are not prepared to say that there was not evidence on which the jury were entitled to arrive at their verdict. Here was a clandestine ride—commonly called a "joy-ride"—on a dark night in

February, without proper lights, and the two men had taken the car for a purpose, which the jury have found was not felonious, but which had as its object a "joy-ride" without the knowledge and assent of the owner. Looking at these facts, and at the actual speed of the car and its movements before and after the collision, we think that the jury were entitled to find that both the appellant and Chapman were responsible for the way in which the car was being driven at the moment of collision.

This appeal, therefore, fails, but, leave to appeal having been granted, the sentence will run from the date of conviction.

Appeal dismissed.

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Solicitors for the Crown : Wontner & Sons.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE WRIGHT.

1930.
21 *July.*

GEORGE ARTHUR BROMBILLA.

Severity of Sentence.

Appeal against sentence.

Appellant pleaded guilty to horsestealing on July 5, 1930, at Middlesex Sessions and was sentenced by the Deputy-Chairman to three years' detention in a Borstal institution.

Appellant in person.

No counsel appeared for the Crown.

The Court, on hearing that the appellant's father was prepared to take appellant home, and that there was prospect of immediate employment for appellant, ordered appellant to be bound over, together with his father, for two years and to be discharged from custody.

Sentence reduced.

T. R. F. B.

JOHN EDWARD POLLINGER.

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Defendant giving Evidence—" Imputations " on the Character of . . . the witnesses for the Prosecution—" Nature or Conduct of the Defence."

Statements by a defendant in evidence which do not *per se* import " imputations " within s. 1 (*f*) (ii) of 61 & 62 Vict. c. 36, the Criminal Evidence Act, 1898, may do so by reason of " the nature or conduct of the defence."

Appeal against conviction, by leave of the Court.

Appellant was convicted at the Central Criminal Court on May 26, 1930, of larceny, and was sentenced by the Commissioner to two years' imprisonment with hard labour.

Marston Garsia, for appellant, who was present:

At the trial the judge allowed appellant to be cross-examined by the prosecution about his previous convictions, on the ground that there had been an imputation on the character of one of the witnesses for the prosecution within the meaning of section 1 (*f*) (ii) of the Criminal Evidence Act, 1898. It is submitted that there was no such imputation, and that the evidence of appellant's previous convictions was improperly admitted. A man named Stow gave evidence for the prosecution that the appellant and two other men and two women were at his house, where some stolen property, including clothing, was. Stow stated that he did not know the property was stolen. Appellant in his evidence said " I thought one [of the women] was Stow's wife because she was handling clothes. Stow and one of the women, I am not quite sure which woman, I do not know either of their names, were arguing about the amount of them and some money, and then I thought something wrong was going on. . . . I walked towards the stairs to go out. As I walked towards the stairs I saw one of the women pass Stow some money." It is to be observed

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that appellant did not say "I still think there was something wrong"—he only stated what he thought at the time and it was part of his defence to explain why he left Stow's house. To fall within the statute, an imputation on the character of a witness must be very clear and very direct. In PRESTON, 1909, 1 K. B. 568; 73 J. P. 173; 78 L. J. K. B. 335; 25 T. L. R. 280; 53 S. J. 322; 2 Cr. App. Rep. 24: *c.q.*, a police inspector was accused of deliberately conducting an identification parade in an improper manner, and it was held that that imputation did not come within the statute.

G. D. Roberts, for the Crown:

The passage in the evidence referred to is not the only one relied on by the Crown. The whole character and conduct of the defence involved the imputation that at least two of the witnesses for the Crown were dealing in stolen goods: the imputation, though veiled, was perfectly clear, and the cross-examination of the appellant was rightly admitted.

THE LORD CHIEF JUSTICE: There was ample evidence on which the appellant could be convicted, but it is said that the judge improperly allowed the appellant to be cross-examined about his previous convictions, and on that question alone this appeal turns.

Our attention has been directed to various other parts of this case with regard to the way in which the defence was conducted, but it is enough to consider how the witness Stow was treated. [His Lordship referred to the passage set out above.] The words in the statute on which reliance is placed are those which forbid a prisoner being cross-examined about his character "unless . . . the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." Those words were considered by this Court, for example, in HUDSON, 1912, 2 K. B. 464, 470; 81 L. J.

K. B. 861; 107 L. T. 31; 28 T. L. R. 459; 56 S. J. 574; 7 Cr. App. Rep. 256. In the considered judgment of the Court of five judges one finds this passage: "In our opinion, where a prisoner, certainly when defended by counsel, has through that counsel accused the witnesses of having committed the crime with which he, the prisoner, is charged, the case comes directly within the section and the prisoner can be cross-examined about his character or previous convictions. We think that the words of the section 'unless the nature or conduct of the defence is such as to involve imputations,' etc., must receive their ordinary and natural interpretation, and that it is not legitimate to qualify them by adding or inserting the words 'unnecessarily' or 'unjustifiably,' or 'for purposes other than that of developing the defence,' or other similar words." In our opinion, these statements of the appellant were statements which formed part of the nature or conduct of the defence, and they did involve an imputation on the character of the witness Stow. They involved the imputation that Stow himself was a receiver of stolen property, and was seen to be dealing in stolen property. It is said that no suggestion of that kind was intended to be made. Be it so, but the best way of not making a suggestion is to refrain from making it. In our opinion the learned Commissioner was in this case justified in admitting the cross-examination about the character of the appellant, and the appeal must be dismissed.

Appeal dismissed.

Solicitors—Lumley, Taunton & Lumley, for appellant; Wontner & Sons, for the Crown.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE TALBOT.

1930.
28 *July.*

JOHN HENRY WILLIAMS.

Many Previous Convictions—Property of Small Value Stolen.

Severity of sentence.

Appeal against sentence, by leave of the Court.

Appellant was convicted at Swansea Assizes on June 27, 1930, of attempted larceny and of larceny and was sentenced by Mr. Justice Roche to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted on an indictment which charged him and another person with the attempted larceny of a suit of clothes and the larceny of a pair of boots. He undoubtedly has a bad record and has been repeatedly convicted of stealing, from the year 1913 onwards, his sentences ranging from three months' to twenty-one months' imprisonment with hard labour. The learned judge who passed sentence had some doubt whether he should pass a sentence of penal servitude in a case where the offence, considered in itself, involved property of small amount. That doubt was due to the view which this Court has again and again expressed, that the sentence passed ought to bear some relation to the intrinsic gravity of the crime, notwithstanding the fact that the offender may have previously committed other and more serious crimes. Looking at all the circumstances of this case, we have come to the conclusion that this sentence ought to be reduced to a sentence of twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

GEORGE EDWARDS.

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GEORGE EDWARDS.

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Severity of Sentence.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at Cambridgeshire Sessions on July 4, 1930, to larceny in a dwelling-house, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The goods stolen were of the total value of £6 17s. 6d., but in the sentence many other cases, involving a long series of petty thefts, were taken into consideration. The appellant is forty-four years of age and has previously been convicted no fewer than sixteen times. In February, 1929, he received a sentence of twenty months' imprisonment with hard labour for burglary. Regard being had to the nature of these offences and the history of this appellant, we think that the sentence may properly be reduced to a sentence of three years' penal servitude, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

ABRAHAM HILDEBRAND.
MORRIS HILDEBRAND.

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MORRIS HILDEBRAND.

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Hearing Adjourned—Effect on Term of Sentence.

When an appeal has been adjourned through no fault of appellant the Court may for that reason make a reduction in the sentence.

Appeals against conviction.

Appellants, who were on bail, were convicted at the Central Criminal Court on February 28, 1930, of conspiracy.

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obtaining goods by false pretences, obtaining credit by fraud, contrary to section 13 of the Debtors Act, 1869, and fraudulent removal of property contrary to section 156 of the Bankruptcy Act, 1914, and were each sentenced by the Common Serjeant to eighteen months' imprisonment in the second division.

Sir Henry Maddocks, K.C. (and *Eustace Fulton*), for appellants, who were present.

Percival Clarke (and *G. D. Roberts*), for the Crown.

THE COURT, after dismissing the appeals against conviction, informed counsel for the appellants that, although there was no application for leave to appeal against sentence, such an application, if made, would be granted by reason of the fact that the hearing of these appeals had been postponed on three occasions, owing to accidental delay.

Maddocks, K.C., accordingly made the application.

THE LORD CHIEF JUSTICE: Owing to the accidental delay in the hearing of these appeals, we think that the fair course is to reduce the sentence of each appellant as follows: on the charges relating to conspiracy and false pretences, to a sentence of fourteen months' imprisonment in the second division, and on the charges relating to obtaining credit by fraud and fraudulent removal of property, to a sentence of twelve months' imprisonment in the second division. The sentences to run concurrently from to-day. In these sentences we take into consideration the fact that the appellants were one month in custody before being admitted to bail.

Sentences reduced.

Solicitors for appellants: S. Myers & Son.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE BRANSON AND MR. JUSTICE MACNAGHTEN.

ISAAC WAXMAN.

1930.
31 *July.*

Long Vacation—Bail.

Bail granted on terms in view of the Long Vacation, and the circumstances of the case.

Application for bail.

Applicant was convicted of obtaining goods by false pretences and of obtaining credit by fraud at the Central Criminal Court on July 15, 1930, and was sentenced by the Common Serjeant to fifteen months' imprisonment in the second division.

Sidney Isaacs, for applicant:

The case was very complicated and involved detailed inquiry into matters of account. It is desired that the applicant should have the opportunity of conferring freely with his legal advisers with regard to his appeal. There are substantial grounds of appeal. Before conviction, applicant bore a very good character, and the same sureties as were accepted by the police magistrate are offered. The application is based on the further ground that the appeal cannot be heard for over two months. [Counsel read an affidavit by applicant's solicitor.]

MR. JUSTICE AVORY: We think that in this case the application should be granted, on the terms that the applicant finds two sureties for £1,000 each to the approval of the police and enters into his own recognisance in the sum of £1,000.

Application granted.

Solicitor for applicant: Johnathan E. Harris.

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JAMES HARRISON.

JAMES HARRISON.

Avory, J.,
Branson, J.,
Macnaghten, J.

Robbery—Violence.

Any violence is sufficient in law to sustain an indictment of robbery with violence.

Application for leave to appeal against conviction and sentence.

Applicant was convicted on July 17 at the Central Criminal Court of robbery, and was sentenced by the Recorder to five years' penal servitude.

In dismissing the application of this applicant, who had been convicted at the Central Criminal Court of robbery and sentenced to five years' penal servitude, MR. JUSTICE AVORY said: "Clearly the applicant should have been convicted of robbery with violence, with which he was charged, but for some reason of which the Court cannot approve, the Recorder told the jury that they might convict of robbery only, if they thought that the violence was not excessive or that it was not such as to justify a conviction of robbery with violence. This may lead to the idea that, in order to justify a conviction of robbery with violence, there must be excessive violence or serious injury. There is no such principle known to the law. Some of the jury may have had their own views about the punishment of flogging and made that an excuse for convicting the applicant of a lesser offence than that of which he ought to have been convicted."

Application dismissed.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

WILLIAM ROBERT HATCH.

1930.
20 *October.*

Term of Sentence—Formal Variation.

The Court below cannot antedate a sentence before the first day of the sessions.

Application for leave to appeal against sentence.

Applicant pleaded guilty to house-breaking at Devon Sessions on October 1, 1930, and was sentenced by the learned Chairman to eighteen months' imprisonment with hard labour to run from July 11, 1930.

No counsel appeared, and applicant was not present.

SWIFT, J.: In all the circumstances of the case, we substitute a sentence of fifteen months' imprisonment with hard labour, to date from October 1, 1930, and so give effect to the judgment of the court below.

Application dismissed.

T. R. F. B.

1930.
20 *October*.

BENJAMIN HORSFIELD SYKES.

BENJAMIN HORSFIELD SYKES.

Avory, J.,
Swift, J.,
Acton, J.

Bail after Custody—Period not Counting for Sentence.

Where an application has been adjourned for allegations by applicant to be investigated, the Court may exceptionally on the hearing of the application allow the time of custody to run for sentence.

Application for leave to appeal against conviction and sentence.

Applicant was convicted of shopbreaking at Sunderland Sessions on July 4, 1930, and was sentenced by the Recorder to nine months' imprisonment with hard labour.

No counsel appeared, and applicant was on bail.

SWIFT, J.: In consequence of certain allegations made by the applicant, this case was adjourned for investigation and on July 31 the applicant was released on bail. Those allegations have been proved to be groundless.

There is no ground whatever for interfering with the conviction, and having regard to the nature of the offence and the applicant's previous character, the sentence is not one whit too long. He was in custody for one month before being released on bail, and, in the peculiar circumstances of this case, we think that that period should be allowed to count in his sentence. The effect of this is that he will have to serve a sentence of eight months' imprisonment with hard labour from to-day.

Application dismissed.

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KENNETH LEE.

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20 *October*.

KENNETH LEE.

Avory, J.,
Swift, J.,
Acton, J.

Consecutive Sentences—One Conviction Quashed—Period not Counting for Sentence — Larceny — Obtaining Credit by Fraud.

When consecutive sentences have been passed on two convictions and the Court quashes one of them, it may allow the sentence for the other to run from the date of conviction.

In summing-up larceny and obtaining credit by fraud must be carefully distinguished.

Appeal against conviction (on one count only) by leave of the Court, which had refused leave on another.

Appellant was convicted of larceny at Bournemouth Sessions on June 30, 1930, and was sentenced by the Recorder to ten months' imprisonment with hard labour. He was also convicted at the same sessions, upon a second indictment, of obtaining credit by fraud, and for this offence he was sentenced to five months' imprisonment with hard labour, the sentences to run consecutively. The appeal was in respect of the first conviction only.

W. M. Walker, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

At midday on Saturday, May 10, appellant visited a clothing store and selected certain clothes to be sent to his address by 6 p.m. on the following Monday, the terms being cash on delivery. Later on the same evening, appellant came again to the store and said that he urgently required certain of the goods which he had already ordered. He said that if the manager would send them that evening, he would pay for them when the remainder were sent on Monday, and certain articles of clothing were accordingly sent to his address on the Saturday. It is submitted that this was no larceny, but a sale on credit of these goods.

Walter Lloyd, for the Crown, contended that there was evidence to support the conviction.

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AVORY, J.: We are not concerned to-day with the question of what the position might have been if the original arrangement that the goods were to be delivered on the Monday evening and paid for on delivery had been adhered to. If the appellant had obtained possession of those goods on the Monday evening by some trick, when the understanding was that they were to be paid for on delivery, he might have been convicted of larceny by a trick. We are concerned only with what took place at the second interview on the Saturday evening. The evidence clearly shows that the prosecutor agreed to let the appellant have certain of the goods on credit. In these circumstances, it is clear that there was a sale on credit, and no larceny by a trick, on the Saturday. There was, in fact, no evidence on which the jury could properly convict, and the Recorder should have given effect to the submission on behalf of the defence at the close of the case for the prosecution that there was no evidence of larceny by a trick of the goods delivered on the Saturday. The appeal must, therefore, be allowed and the conviction quashed.

The conviction for obtaining credit by fraud stands, but the sentence of five months' imprisonment with hard labour passed in respect of that offence will run from the date of the conviction.

One conviction quashed.

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JOHN HENRY LAPWORTH.

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JOHN HENRY LAPWORTH.

Avory, J.,
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Acton, J.

Grievous Bodily Harm (Common Law) to Spouse—Evidence of one Spouse against the Other—Compellability.

On a charge at common law of violence by one spouse to the person of the other, the latter is not merely a competent, but also a compellable witness against the former. LEACH, 1912, A. C. 305; 7 Cr. App. Rep. 84, 158, 172, distinguished.

Appeal against conviction.

Appellant was convicted at Warwick Assizes on July 10, 1930, of causing grievous bodily harm to his wife with intent to do her grievous bodily harm, and was ordered by Rowlatt, J., to be bound over in the sum of £10 for twelve months.

Douglas Jenkins, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not in custody:

The appeal raises a short point of law, namely, whether a wife is compellable to give evidence against her husband on a charge involving bodily injury to her by the husband. The judge in the present case held that she was, and compelled her to give evidence against her husband though she was reluctant to do so. The point appears never to have been decided in the English courts, and writers of text-books on evidence regard it as an open one; but in an Australian case, E. PHILLIPS, 1922, S. Aust. State Rep. 276, where a wife was charged with wounding her husband with intent to murder him, it was held that the husband was not a compellable witness. The decision in that case is adopted as part of the argument on behalf of the present appellant. There are dicta in the opinions of the House of Lords in LEACH, 1912, A. C. 305; 81 L. J. K. B. 616; 106 L. T. 281; 22 Cox C. C. 721; 28 T. L. R. 289; 76 J. P. 201;

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56 Sol. J. 342; 7 Cr. App. Rep. 84, 158, 172: *c.q.*; to the same effect, particularly in the opinion of Lord Atkinson, who, during the argument, referred to a wife as being "unlike all other witnesses."

[SWIFT, J.: Is there any case in which it is said that where a wife is a competent witness at common law she is not compellable?]

There does not appear to be any case to that effect.

E. A. Hawke, for the Crown:

If a witness is competent at common law, that witness is also compellable; there is no authority to the contrary. The decision in LEACH was based on the ground that before the Criminal Evidence Act, 1898, the wife could not have given evidence at all on a charge of that kind. At common law she has always been a competent witness in charges involving personal injury to her, as, for example, in AUDLEY, 3 St. Tr. 402, 411: 1631.

AVORY, J.: The interesting argument to which we have listened in this case is somewhat academic, because, on the facts of the case, the appellant was in the result only bound over in the sum of £10 to keep the peace and to be of good behaviour for twelve months, and from the account of the proceedings the parties appear to have made up their differences and to have left the Court happily together; but as a point of law has been raised and discussed, it is necessary to give a decision on it.

The short point is whether in a case of personal violence having been used by a wife towards a husband, or by a husband towards a wife, the injured husband or wife, as the case may be, is not only a competent, but also a compellable witness. There is no question, to my mind, that at common law in such cases a husband or wife was always a competent witness, and from the very nature of things it must have been so; otherwise, when the assault has been committed by one spouse upon the other in

secret, there would be no means of proving it. Whatever the reason be, I am satisfied that at common law, in such circumstances, a wife was always a competent witness on a charge against her husband of having assaulted her. If it is once established that she was competent, I think it follows that she was compellable at common law, and remains so under section 4, sub-section 2 of the Criminal Evidence Act, 1898, that is to say, when either she has made her complaint or independent testimony has been given of an assault by the husband on the wife, as soon as she is summoned to appear as a witness to prove the facts of the case she is, in my opinion, like any other witness and is bound to answer the questions put to her; in other words, she becomes a compellable witness.

It is said that there is no direct authority on this point. It does sometimes happen that, where it has been generally recognised that an established state of the law exists and where it has never been questioned, there is to be found no direct authority. I doubt whether the question has ever been raised before in this direct form. It has always been assumed in practice that in such cases, even though the woman, when she comes into Court, either expresses reluctance to give evidence, or definitely desires not to give evidence against her husband, it is the duty of the tribunal to ascertain the facts and, if necessary, to compel her to give that evidence.

It has been suggested that in the case of LEACH—a charge of incest—which was argued in the House of Lords in 1912—there are expressions in the opinions of the learned Lords which are inconsistent with this view, and in particular a passage from the opinion of Lord Atkinson has been cited: "The principle that a wife is not to be compelled to give evidence against her husband is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment . . . ," and there are passages in

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the opinion of Lord Halsbury and also in the opinion of the Lord Chancellor [Loreburn] to the same effect, but it must be borne in mind that the House of Lords in that case was dealing with the effect of a statute—the Criminal Evidence Act, 1898—which had expressly authorised a wife or husband to give evidence in certain cases. The view I have expressed is confirmed by the following observations of Lord Halsbury during the argument: "I should have thought that if the known state of the law was that in order to confer competency you had to enact it, the fact that you simply used the word 'competent' did not necessarily mean 'against his or her will.'" I read that as meaning that if the known state of the law is such as to confer competency without any statute, then compellability follows as a matter of course from that competency, and I am satisfied that in the case of LEACH the learned Lords had not present to their mind the case which is now before this Court, where personal violence has been done by a husband to a wife. I am satisfied that in the general observations which they there made and which have been relied on on behalf of the appellant they had no intention of including cases such as the one with which we have to deal to-day.

For these reasons we think that the learned judge was right in telling this witness that she was bound to give evidence and that there was no misdirection by him in law. The appeal therefore fails.

Appeal dismissed.

T. R. F. B.

LESLIE TURKINGTON.

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Direction—Theory of Defence Consistent with Innocence—Review of Facts by the Court.

An alternative theory put forward by the defence which is consistent with the evidence ought not to be ignored in the summing-up and the Court will consider it.

The Court will not interfere with the findings of fact by a jury if they have been properly directed and could reasonably arrive at the verdict.

Appeal against conviction.

Appellant was convicted of manslaughter at the Central Criminal Court on July 18, 1930, and was sentenced by Branson, J., to three years' penal servitude.

W. A. Fearnley-Whittingstall, for appellant, who was present:

The deceased met her death by falling from a window of the flat, where she had been living with appellant, into an area below. The case for the Crown was that appellant had struck her a blow on the chin while she was trying to climb in through the window. In his summing-up, Branson, J., referred to the blow as being necessarily an unlawful blow, but although the woman had been living in the flat with appellant, appellant had good reason for refusing her further admission; and, if she were in fact a trespasser, he was entitled to use a reasonable degree of force in ejecting her: HUSSEY, 41 T. L. R. 205; 18 Cr. App. Rep. 160; 1924: *c.q.*

[SWIFT, J.: The jury were not told that such force as was necessary, and no more, might be used to keep her out; they were told that the use of any force was unlawful.]

Appellant's case, however, was that no blow at all was given by him to the woman at that time, and there was no

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evidence that she was struck when trying to climb in through the window.

Eustace Fulton, for the Crown:

HUSSEY does not apply to this case, because there was no evidence that the woman was seeking to dispossess appellant. There was evidence that the woman was struck on the chin by appellant while trying to enter the flat by means of the window.

AVORY, J.: The theory of the prosecution in this case, which must be taken as having been accepted by the jury, was that the woman was evicted from the flat after a quarrel, and that, as she was attempting to get back into the flat through the window, she was violently struck by the appellant, and that the blow caused her to fall into the area.

This Court never interferes with the verdict of a jury on a question of fact, if the jury has been properly directed and if there was evidence on which they could reasonably arrive at their verdict. The defendant was not bound to put forward any theory of death, but we are bound to consider, not only the theory of the Crown, but also the alternative theory that was strongly urged on behalf of the defendant, that the woman slipped on the window sill and so met her death. If that alternative theory was possible and consistent with the evidence, the appellant was entitled to be acquitted. The medical evidence was that the woman's fall might have been brought about by a blow on her chin; but it was qualified by the evidence of another doctor, who admitted that all the symptoms displayed were consistent with a mere fall from the window. There was evidence by the appellant, and nothing to contradict it, that the blow on the woman's chin was given when she was endeavouring to force an entry through the door of the flat and before she climbed on to the window.

On the other point raised on behalf of the appellant—

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that the appellant was justified in striking the blow in defence of his flat—it is not necessary to express an opinion. The Court is of opinion that the verdict is unreasonable and cannot be supported having regard to the evidence; and in the circumstances the appeal will be allowed and the conviction quashed.

Conviction quashed.

Solicitors for appellant: John Hill & Son.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

ARTHUR STANLEY TEAPE-WHITE.

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Leaving Counts on the File.

Observations on the practice.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at Bournemouth Sessions on June 30, 1930, of obtaining credit by fraud, and was sentenced by the Recorder to seven months' imprisonment with hard labour.

No counsel appeared and applicant was not present.

In refusing the application, SWIFT, J., said: In addition to the count on which the applicant was convicted, there were two other counts in the indictment, but these were ordered to remain on the file. Speaking for myself, I think

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it is wrong to leave counts remaining on the file and not to proceed with them. The meaning of leaving them upon the file is that possibly—although it is not likely to occur—after the applicant has served his sentence for the charge contained in the first count, he may be proceeded against on the other two counts. In my view, this is not proper and the practice of leaving counts on the file is not one to be encouraged.

Application dismissed.

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Application exceptionally treated as Final Appeal—Length of Interval without Conviction.

Sentence for "outstanding charges" should not ignore a long period without conviction.

Application for leave to appeal against sentence.

Applicant pleaded guilty at Middlesex Sessions on September 20, 1930, to obtaining goods by false pretences. At his request a large number of outstanding charges were taken into consideration, and he was sentenced by the Chairman to three and a half years' penal servitude.

As applicant had expressed his desire not to be present, and as the Crown did not desire to be represented, the Court dealt with the application forthwith.

AVORY, J.: Although the appellant has been convicted in the past of offences of dishonesty, going back as far as 1898, there have been considerable intervals between those convictions. His last recorded conviction was in 1921, and from August, 1922, till the date of the first of these offences which were taken into consideration—July, 1928—

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no conviction was recorded against him. There was, therefore, an interval of six years during which he must be presumed to have been trying to obtain honest employment. It does not appear to this Court that sufficient attention was paid to this fact, and in the circumstances we reduce the sentence to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

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" *Little Stockbroker* " *Machine*—16 & 17 *Vict. c.* 119, *ss.* 1—3, *Betting Act*, 1853—17 & 18 *Vict. c.* 138, *s.* 4, *Gaming Houses Act*, 1854.

" *Purposes* " *of* " *Persons Resorting thereto* "—*Issue for the Jury.*

A machine may be used for the purposes of " gaming " and " betting " even though, if the directions affixed to it are obeyed, it is certain that the user will win something.

In a conflict of evidence it is for the jury to decide for what purposes persons " resort " to the premises in question.

Appeals against conviction.

Appellant Newby was convicted of having the care or management of a betting house, contrary to sections 1 and 3 of the Betting Act, 1853, and of having the care or management of a gaming house, contrary to section 4 of the Gaming Houses Act, 1854, and appellants Brennand and Daniels of assisting in the conduct of the business. All three appellants were also convicted of keeping a common gaming house. The convictions took place at Lancashire Sessions on July 18, 1930, and each of the

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appellants was ordered by the Chairman to be bound over and to pay the costs of the prosecution: they were not in custody.

Sir H. H. Curtis-Bennett, K.C. (*St. John Hutchinson* and *D. Curtis-Bennett,* with him), for appellants: The alleged offences were committed by means of machines known as the "Little Stockbroker," which were kept by appellants together with a number of other automatic machines on premises at Blackpool. Over each of the "Little Stockbroker" machines was a printed notice to the following effect:—

"Children under sixteen are not allowed to use this machine. The 'Little Stockbroker' is provided for amusement only, and contains no element of chance or lottery. The machine does not compete with the player, but it charges a fixed price of one penny for nine games on the average, and it returns all the other coins to the player if he continues to play.

"Your penny buys the 'stock' that is shown behind the pointer, and if the 'stock' carries a dividend, such as 'sterling,' 'textiles,' 'shipping,' 'rubber,' or 'coal' you can purchase that dividend by inserting one penny in the slot and pressing the lever. If the stock showing is 'bonds,' 'loans,' or 'trusts,' you will get nothing. The disc then moves to a new position offering a fresh 'stock' for sale, which you may purchase if you choose.

"The diagram affixed to the front of the machine is an exact copy of the spinning disc, and this disc does not stop by chance but it moves five spaces in the direction shown by the arrow every time the machine is operated. As the combination of the four 'stocks' shown through the window is never repeated on the spinning disc, you can easily find out where the disc is standing before you play. Then you have only to count five spaces back and you can read all future purchases.

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" All the results are therefore certain and pre-determined, and you cannot gamble on a certainty. At a charge of one penny for nine games the ' Little Stockbroker ' is one of the cheapest amusements ever devised."

It was explained at the trial that the machine bore on the face of it the name and value of eight different stocks—namely, " Sterling, 6d.; textiles, 5d.; shipping, 4d.; rubber, 3d.; coal, 2d.; loans, nil; bonds, nil; trusts, nil." Those appeared in groups of four at a window in the machine, and by putting in a penny and pressing a lever another set of four stocks appeared. A fixed pointer indicated the third name on the list, and the player, for his penny, received the value of the stock indicated. If he read the printed instructions and followed them closely he could tell exactly what would turn up by counting five spaces on a dial on which the names of the stocks were printed sixty-nine times, but the printing was small and half of it upside down. " Sterling " and " textiles " had only one chance in sixty-nine of turning up, " shipping " three, " coal " ten, and " rubber " six chances, the rest all being losses to the player.

The grounds of appeal are (1) that the Chairman was wrong in law in holding (*a*) that the " Little Stockbroker " machine was an unlawful game; (*b*) that the " Little Stockbroker " machine was a betting machine; (2) that he was wrong (*a*) in not directing the jury what in law constituted an unlawful game and/or a betting machine; (*b*) in not leaving it to the jury to apply the facts of this particular case to such a definition of law.

Here there was no chance or uncertainty, because each time the machine was used, a player, if he read the rules, would know not only what he was going to get for the next penny, but what would turn up for every subsequent penny he put in. This machine is quite distinct from all others which this Court has had to consider, in that it involved no element either of skill or chance. The prosecu-

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tion rested their case on the way in which it was used by the public, to the knowledge of appellants and contended that a machine which was not *per se* a gaming machine was thus turned into a gaming machine. The Chairman should have directed the jury what amounted to unlawful gaming, and then have left it to them to find the facts of this particular case. In THACKER *v.* HARDY, 4 Q. B. D. 685, at p. 695; 48 L. J. Q. B. 289; 39 L. T. 595; 27 W. R. 158: 1878; it was said by Cotton, L.J.: "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say, if the event turns out one way A will lose, but if it turns out the other way he will win." That definition cannot apply here, because in this case nothing was left to uncertainty. Similar definitions are to be found in CARLILL *v.* CARBOLIC SMOKE BALL CO., 1892, 2 Q. B. 484, at p. 490; 62 L. J. Q. B. 257; 67 L. T. 837; 57 J. P. 325; 9 T. L. R. 124; and BEW *v.* HARSTON, 3 Q. B. D. 454; 47 L. J. M. C. 121; 39 L. T. 233; 26 W. R. 915; 41 W. R. 210: 1879. On these authorities, it was wrong for the Chairman to rule that this machine was a gaming machine. When it was suggested that the particular way in which a machine, not *per se* unlawful, was used made it a gaming or wagering machine, it was for the jury, on a proper direction, and not for the judge to find the facts; see the questions left to the jury in PITT, 79 J. P. Newsp. 148: 1915. Here nothing was left to the jury by the summing-up. [He referred also to T. KIRBY AND OTHERS, 20 Cr. App. Rep. 12: 1927; and O. K. WHIST AND SOCIAL CLUB, 73 S. J. 451; 45 T. L. R. 570; 21 Cr. App. Rep. 119: 1929.]

Jackson, K.C., and *Jolly*, for the Crown were not called upon.

AVORY, J.—A full description was given by the two police officers who were called at the trial of the character

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of the machine which was in question in this case. We have nothing to do—and the jury had nothing to do—with the fact that there were other automatic machines on the premises which might be perfectly harmless. The only questions for the jury were whether this machine was, at the material time, being used for purposes contrary to the Betting Act or the Gaming Houses Act, and whether the keeping of those premises for the use of that machine in the manner in which it was used amounted to the keeping of a gaming house at common law.

It is unfortunate that the expressions "unlawful machine" and "gaming machine" have been used in this Court, and were used in the court below, and the Chairman, by the use of those expressions in argument, was himself led into using them. The question is not whether a particular machine, when one looks at it, is a betting or gaming machine; the question is, whether the machine has been used for purposes of gaming or betting, and whether it has been so used by persons resorting to the premises for that purpose. We have been told by counsel that there were on the premises printed directions, of which a specimen has been produced, and that there were dials on these machines, and that if a person read these directions and strictly followed them and studied the dial, the way in which the arrow pointed and so forth, he might make a certainty of winning some money; but the evidence which was before the jury, and which was uncontradicted, was that, with few exceptions, the persons who used this machine did not read the directions or study the dial, but dropped pennies into the machine and took their chance of something coming out; and the description given to us seems to suggest that anyone, who wanted to make a certainty of winning, would have occupied the machine for a great part of the day to the exclusion of all other people. On that state of facts, the Chairman, at the conclusion of the evidence, held that the machine, in

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the manner in which it had been used, was being used for unlawful gaming and for purposes forbidden by the second branch of section 1 of the Betting Act, namely, "for the purpose of any money . . . being received . . . as or for the consideration for any . . . agreement to pay or give . . . any money . . . on any event or contingency of or relating to any . . . game."

It is not disputed that, on the authorities, the question whether the machine was being unlawfully used for either of those purposes is a question of law and not of fact. In the latest case in this Court, to which the Chairman called attention, the O. K. WHIST AND SOCIAL CLUB, the present Lord Chief Justice, dealing with that particular case, said: "The question for this Court is whether the existing law was properly applied in this case," and, referring to JAMES DAVIES, 1897, 2 Q. B. 199; 66 L. J. Q. B. 513; 76 L. T. 786: *c.q.*, he quotes what was said by Lord Russell, C.J., in that case: "It appears that the jury were asked whether the house was used for unlawful gaming, and whether the game of 'German Bank' as played there was an unlawful game. These questions, however, are questions of law for the judge and not of fact for the jury, who must apply the facts to the definition of the law given by the judge." The present Lord Chief Justice went on to say: "That judgment has been confirmed over and over again and this passage was cited with approval by this Court in KIRBY AND OTHERS [above]."

The Chairman in this case was, therefore, right in deciding as a question of law whether this machine was, in the circumstances, being used either for unlawful gaming or for the purposes prohibited by the Betting Act.

It was further submitted to us that, even though the Chairman was right in so holding, as he did, as a matter of law, it should have been left to the jury to say whether the persons resorting to the premises were resorting there for the purpose of gaming. If there had been any real dispute

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with regard to the facts and any real contradiction of the evidence given by the police, it might in that case have been proper for the Chairman to leave it to the jury to say for what purpose those persons did resort to the premises. In point of fact, he did leave the question to the jury in these words: "I tell you that in law this is an unlawful machine . . . and you have to decide whether the people going to that Arcade were going there for the purpose of unlawful gaming in a common gaming house with these machines."

Again, he said: "The question to be left to the jury was whether it was true that the premises were premises where a large number of people were invited to congregate for the purpose of playing an unlawful game."

There is, therefore, no ground for complaint that any question of fact, which was left open, was not left to the determination of the jury.

In these circumstances, having come to the conclusion that the Chairman was right in law in holding that, upon the evidence of the way in which the machine was being used, it was being used for unlawful gaming and for purposes prohibited by the Betting Act and Gaming Houses Act, we can find no ground for complaint with regard to the summing-up, and the appeal must be dismissed.

Appeal dismissed.

Solicitors—Slaughter & May, for appellants; Sharpe, Pritchard & Co., agents for the Town Clerk, Liverpool.

T. R. F. B.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE ACTON AND MR. JUSTICE TALBOT.

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WILLIAM LAWRENCE CONNELL.
THOMAS IRVINE.

"Criminal Habits or Tendencies"—"Association with Persons of Bad Character"—Borstal Discipline.

Whether a young offender is a person "of criminal habits and tendencies" or in "association with persons of bad character," within section 1, sub-section 1 (b) of 8 Edw. 7, c. 59, is a question of fact in each case; but, *semble*, the evidence of such facts must be clear and certain: trifling offences or casual association with one criminal are not sufficient to satisfy the statute.

Appeals against sentence, by leave of the Court.

Appellants pleaded guilty to burglary at the Kent Assizes on June 23, 1930, and were each sentenced by Avory, J., to three years' detention in a Borstal institution.

D. Curtis-Bennett, for appellants (under section 10 of the Criminal Appeal Act, 1907), who were present:

It is submitted that appellants should not have been sentenced to detention in a Borstal institution, as the requirements of section 1, sub-section 1 (b) of 8 Edw. 7, c. 59, the Prevention of Crime Act, 1908, were not here fulfilled. There was no evidence that they were of "criminal habits or tendencies," Irvine never having been previously convicted and Connell having been convicted of only two minor offences of gaming; nor that they were in "association with persons of bad character." Something more than implication in the crime of which an offender is convicted is required, in order to bring him within the statute. [He

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referred to STENSON AND ANOTHER, 22 Cr. App. Rep. 18: 1930, *s.r.*, and was stopped.]

Lancelot Fletcher, for the Crown:

The Court that passes sentence has to consider criminal "tendencies" as well as criminal "habits" in the offender; and some evidence of those tendencies is to be found in the nature of the particular offence of which the offender is convicted. Unlike the appellants in the case of STENSON AND ANOTHER, the appellants in this case were committing the offence in co-operation and association with a convicted man.

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SWIFT, J. (*a*): William Lawrence Connell and Thomas Irvine pleaded guilty at the Maidstone Assizes to an indictment which charged them together with a man of the name of Ian Dempster and a man of the name of Alec Ferguson with burglary.

The four of them were found in a platelayer's hut close to the Ashford and District Co-operative Stores, which on June 9 at about one o'clock in the morning were broken into, and when they were charged the four admitted their guilt and told where some of the stolen property would be found, and Connell and Irvine both made statements to the effect that they desired to get out of the Army. The learned judge had before him a very difficult problem in deciding what was to be done with these four boys in the interests of the community and for their own benefit. Ultimately he decided that one of them who had nothing at all against him and whom the Army authorities were willing to take back, should be bound over and go back into the Army, and one who was on licence from Borstal should be sent to prison for a month in order that the

(*a*) This judgment is a copy of a transcript supplied by the courtesy of the Director of Public Prosecutions.

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Borstal authorities might have an opportunity of taking him back again for Borstal discipline. With regard to the two present appellants, Connell and Irvine, the learned judge came to the conclusion that the proper course in their interests and in the interests of the community was to sentence them to not more than three years' detention in a Borstal institution.

From that sentence they now appeal, and the only question which this Court has to determine is whether upon the facts of this particular case these two boys come within the provisions of the Prevention of Crime Act, 1908, s. 1, sub-s. 1, which provides the conditions under which convicted persons may be sent to a Borstal institution.

That section provides that: "Where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the court: (a) that the person is not less than sixteen nor more than twenty-one years of age; and (b) that, by reason of his criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the court, in lieu of passing a sentence of penal servitude or imprisonment, to pass a sentence of detention under penal discipline in a Borstal Institution for a term of not less than one year nor more than three years."

The question here is: Was there any evidence upon which the court could come to the conclusion that these youths were of criminal habits or tendencies, or that by reason of their association with persons of bad character it was rendered expedient that they should be dealt with under the discipline of a Borstal institution?

The evidence against both was that before this offence to which they had pleaded guilty there was nothing against them except that against Connell there were two fines of

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5s. for gaming. We are not told what that means, but I assume that he had been playing some game of chance in some public place instead of in the privacy of his own home or club. For that he was fined, upon two occasions, 5s. For my part, I decline to regard such a thing as any evidence of criminal habits or of criminal tendencies. Apart from that, there was nothing against either of these two young men.

It is perfectly true that they were in a sense associates of Ferguson who was a party to the crime to which they pleaded guilty and who had previously been convicted, but even if he were a person of bad character it does not appear that they were associates of his in the sense of being voluntary associates. They happened to be in the same regiment, and therefore they, no doubt, knew him.

There was, in our opinion, no evidence in this case of criminal habits or tendencies or association with persons of bad character which rendered these two youths amenable to Borstal discipline. It may be, or it may not be—I do not know—that the best thing for them might be Borstal discipline. That we need not speculate upon, because the conditions of the Act of Parliament which provides Borstal discipline for young people are not existent in their case.

In these circumstances, in our opinion, this appeal must be allowed and this sentence of detention in a Borstal institution must be set aside, and in lieu thereof they must each be kept in prison for a space of six calendar months from to-day, and as there has been no previous conviction against them, and no evidence of previous bad character, they shall be placed in the second division.

Sentence varied.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE ACTON AND MR. JUSTICE TALBOT.

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MICHAEL DENNIS CORRIGAN.

Fugitive Criminal — Extradition — Treaty with France — "Surrender"—33 & 34 Vict. c. 52, ss. 2, 6, 19, Extradition Act, 1870 — Order in Council, May 16, 1878 — Jurisdiction of Court—Onus of Proof.

If a defendant, who has in fact been given into the custody of the police of this country by a State with which there is a British Extradition Treaty, objects to the jurisdiction of the court of trial on the ground that he has in fact been extradited under the Treaty (which is a matter for the judge and not for the jury) and can therefore claim any protection it may afford, the *onus* of proof of such extradition is upon him. *Held* (by a majority) that appellant had not discharged this *onus*.

Section 19 of the Extradition Act, 1870, 33 & 34 Vict. c. 52, is not affected by Art. iv of the Extradition Treaty between France and Great Britain, 1878 (binding on British courts (*a*) by virtue of an Order in Council of May 16, 1878, under section 2 of that Act): the court of trial has therefore jurisdiction to try a "fugitive criminal" on any "crime" that "may be proved by the facts on which the surrender is grounded."

Appeal against conviction.

Appellant was convicted after six days' trial at the Central Criminal Court of fraudulent conversion, and on September 17, 1930, was sentenced by the Commissioner to five years' penal servitude.

J. P. Eddy (*M. Lush* with him) for appellant, who was present:

Appellant was convicted on a number of counts in an

(*a*) See A. T. WILSON, 3 Q. B. D. 42: 1877.

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indictment which charged him with fraudulent conversion. A second indictment charging him with obtaining money by false pretences was not proceeded with. The ground of the appeal is that, by reason of matters relating to extradition law, the Central Criminal Court had no jurisdiction to take cognisance of the indictment for fraudulent conversion. Appellant was arrested in France on November 13, 1929, on a warrant which charged him with obtaining money by false pretences. He was kept in prison in Paris for about three months, and made five appearances before a French court, and two additional English warrants for obtaining money by false pretences were shown to him by the French Public Prosecutor. On January 6, 1930, the French Minister for Foreign Affairs informed the British Embassy in Paris that appellant had consented to be handed over, without the formalities of extradition being completed. He was then taken from Paris to Boulogne in a prison van, and at Boulogne was put in prison to await the arrival of British officers. He was taken in custody to London. The judge at the trial held that appellant had not been surrendered, because no order for surrender was produced. He appears to have based his decision on F. BUTLER, 18 New South Wales Rep. (Law) 146; 1897 (Crown Case Reserved: three judges), where Archbold states: "The burden of proof that he [the accused] was surrendered under the treaty and that the offences charged were not included in the order for surrender seems to rest upon him and not on the Crown." The question for the Court, however, was whether appellant was in fact "surrendered." "Surrender" has no technical meaning, except that it must be made in pursuance of an agreement between two countries for delivering up fugitive criminals. One must look at the Extradition Act, 1870, 33 & 34 Vict. c. 52, ss. 2, 19; the Treaty of August 14, 1876, between England and France, ratified April 8, 1878; and the Order in Council of May 16, 1878 (Statutory Rules and Orders,

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Vol. 5, Appendix ("Fugitive Criminals"), p. 86), embodying the Treaty and, by virtue of section 2 of that Act, applying the Extradition Act to France from May 31, 1878, and giving it the force of law. Art. iv of the Treaty is: "The present Treaty shall apply to crimes and offences committed prior to the signature of the Treaty; but a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted" (Clarke on Extradition (4th ed.), Appendix, p. ccxvi). The Article does not speak of an "order for surrender."

Section 19 of the Act prohibits trial here for any pre-surrender offence "other than such of the said crimes as may be proved by the facts on which the surrender is granted."

For the procedure in France, see Sir Edward Clarke on Extradition (4th ed), p. 227. The Treaty provides for a decree by the French President, but this was found inconvenient in practice, and the procedure has been altered. [He referred to several circulars set out in Kirchner's "Extradition".] It is clear that the Order in Council limits the operation of the Act; WILSON, 3 Q. B. D. 42; 37 L. T. 354; 26 W. R. 44; 13 Cox C. C. 630; 1877; 14 Halsbury, p. 946. In THE LENNIE MUTINEERS (GARGALIS AND OTHERS), 84 C. C. C. Sess. Pap. 37: 1876, Holker, A.-G., concurred that a person extradited for murder could not be tried for being an accessory after the fact to murder and withdrew the case against one prisoner on that ground. False pretences and fraudulent conversion are quite distinct offences and accordingly a person who has been extradited on a charge of false pretences cannot be charged here with fraudulent conversion. The waiver by the appellant of preliminary matters which had to be performed by the French Government before extradition proceedings were complete cannot alter the fact

that appellant was surrendered. In BUTLER the facts were wholly different from the facts of this case. In that case there was no evidence of extradition proceedings having been taken: in this case the crucial question is, not whether there were extradition proceedings in France or any investigation of the matter before a French court, but whether appellant was surrendered in pursuance of an arrangement between Great Britain and France for the surrender of fugitive criminals: section 19 of the Act of 1870, as modified by Art. 4 of the Treaty. If, as is clear, appellant consented to be handed over before the completion of the formalities of extradition then at least such formalities had been begun. In that case appellant must have been surrendered under the Treaty and therefore he cannot waive the benefit of a provision agreed to between France and Great Britain: FLANNERY, 1923, 3 Western Weekly Rep. (Can.) 97: [40 Can. C. C. 263].

[SWIFT, J.: Can a point with regard to the jurisdiction of the court be taken after the jury have been sworn and after the prisoner has been given in charge? Was not the proper procedure here a motion to quash the indictment?]

In JAMESON AND OTHERS, 1896, 2 Q. B. 425; 65 L. J. M. C. 218; 12 T. L. R. 551; 75 L. T. 77; 60 J. P. 662; 18 Cox C. C. 392, counsel for the accused moved to quash the indictment before plea, and again after the accused had pleaded "not guilty" and before the jury were sworn, and, after verdict, moved in arrest of judgment. The law on this matter is referred to in 9 Halsbury, p. 355, and the text-books. Although it is highly convenient that an objection of this kind should be taken at an early stage, it remains valid, whenever taken. Here in fact the objection was taken in the Court below, and the judge dealt with it and dismissed it.

[SWIFT, J.: Does not the whole of Art. 4 of the Treaty apply only to persons who have committed offences before the Treaty, but have been extradited after the Treaty?

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There is no division of the Article by full stop or paragraph.]

This cannot be the correct interpretation; see Art. 1 (*b*), which governs the whole Treaty and section 6 (*c*) of the Extradition Act, 1870.

[ACTON, J.: Do not the words "crimes and offences" in the Article refer only to the substance of the crime or offence, and not to the formulation of it according to a particular system of jurisprudence?]

This cannot be so; for the particular "crimes" are specified in Art. 3. The precise words of stipulated crimes are to be found in the First Schedule to the Act, and precisely the same words are to be found in the Treaty.

[TALBOT, J.: The concluding words of section 19 of the Act could have been excluded by Art. 4 of the Treaty, but are not; they are to the effect that a "surrendered" person shall not be tried (on that surrender) for crimes "other than such of the said crimes as may be proved by the facts on which the surrender is granted."]

As between this country and France one must look at the Treaty and not at an Act of Parliament by which France is in no way bound.

[SWIFT, J.: Is not extradition granted not for a specific crime, but upon a certain state of facts?]

(*b*) Art. 1 is: "The High Contracting Parties engage to deliver up to each other those persons who are being proceeded against or who have been convicted of a crime committed in the territory of the one Party and who shall be found within the territory of the other Party, under the circumstances and conditions stated in the present Treaty."

(*c*) Section 2 (now "spent") of 36 & 37 Vict. c. 60, the Extradition Act, 1873, declared in "explanation of section 6" above: "A crime committed before the date of the order includes in the said section a crime committed before the passing of the principal Act [1870] and the principal Act and this Act shall be construed accordingly."

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Extradition is granted in respect of specific crimes. Here France was asked to surrender appellant so that he might be prosecuted on the charge of obtaining money by false pretences.

Further, evidence was wrongfully admitted that the appellant had at one time been an undischarged bankrupt, which was not relevant to any issue before the jury; the judge in his summing-up did not refer to the necessity of "intent to defraud" being proved as an ingredient of the offence, and omitted to refer to the contents of certain material documents.

E. Fulton, for the Crown:

The question to be considered is, what is the meaning of "surrender" in the statute and in Art. 4 of the Treaty. It is submitted that "surrender" must mean a formal surrender—the kind of surrender for which the Treaty was brought into being. At any rate there can be no surrender without a decree of the President, though the procedure laid down in the Treaty has subsequently been altered. [He referred to a number of circulars which had altered the procedure in France.] The onus was on the defence to prove that there had been a surrender of the kind contemplated by the Treaty. Here they proved the contrary—that there had been a surrender by the individual himself. The Treaty of 1876 is stated to be "for the mutual surrender of fugitive criminals," and replaced a Treaty of 1843, in which the words "reciprocal extradition" were used. Both phrases mean precisely the same: there is no difference in meaning between the words "delivery up," "extradition" and "surrender." Further, when Art. 4 of the Treaty speaks of "the crime for which his surrender has been granted" it must refer to the set of facts on which he is surrendered, not to the particular denomination of crime mentioned.

Maurice Lush replied.

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SWIFT, J. (*d*): On September 9, 1930, Michael Dennis Corrigan was given in charge of a jury at the Central Criminal Court upon an indictment containing thirteen counts alleging against him various offences of fraudulent conversion contrary to section 20, sub-sections 1, 4 (a) of the Larceny Act, 1916.

That indictment, together with one containing charges for obtaining money by false pretences contrary to section 32, sub-section 1 of the Larceny Act, had been found against him by the grand jury at the Central Criminal Court on June 24, 1930. An application by the defence for the trial to be postponed to July was made at those June Sessions at which the bill had been found, and on July 15 a further application for postponement was made until September 9 on the application of the defence.

Before being given in charge upon the indictment for fraudulent conversion, the prisoner had pleaded "Not Guilty." No motion was made to quash the indictment and the trial proceeded in the ordinary way before the learned Commissioner (Judge Holman Gregory) and the jury.

During the cross-examination of the first witness, Mr. Eddy, who represented the prisoner, stated to the Court that "at the proper time I shall object to any counts being left to the jury other than those for false pretences."

As a matter of fact there were no charges of false pretences contained in the indictment which was then being tried, but it became apparent in the course of discussion that Mr. Eddy's intention was to object to the accused being tried in this country for any offence other than that of "obtaining money by false pretences," on the ground that he had been extradited from France to this country only on charges of false pretences, and that it was therefore

(*d*) From a transcript supplied by the courtesy of the Director of Public Prosecutions.

not competent to the criminal courts of this country to take cognisance of any other offence than that of obtaining money by false pretences in respect of which he was surrendered to the officers of the English police.

In order that it might be determined whether that objection was or was not well founded, it became necessary to ascertain the facts, and from the transcript of the shorthand notes of what took place at the trial, it appears to be quite clear that it was agreed that the burden of proving the facts essential to support Mr. Eddy's contention rested upon the accused and that the ascertainment of such facts from such evidence as might be adduced was the duty of the presiding judge and not a matter for the jury. Both these views are correct.

Having heard evidence in regard to this point, the learned judge decided against the contention, and the trial proceeded, with the result that at the end of seven days the prisoner was found guilty upon twelve out of the thirteen counts. No motion was made in arrest of judgment, and the prisoner was sentenced to five years' penal servitude. From this conviction and sentence he has appealed to this Court on nine grounds, which may be conveniently arranged in two groups, the first relating to the contention that the prisoner was not triable in this country upon the indictment upon which he was tried and convicted, because of the law relating to extradited persons, and the second relating to various matters, in which it is said that, apart from this contention, the trial was improperly conducted, either as regards the admission of evidence or the non-direction or mis-direction of the jury.

With regard to the first of these grounds of appeal, Mr. Eddy has very carefully called our attention to the facts which have been proved, and has very fully and with characteristic ability argued the point of law which he alleges arises on these facts, but in our view, on these grounds of appeal, this Court cannot interfere with this

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conviction. This argument is based upon section 19 of the Act of 1870, and Art. 4 of the Treaty of April 8, 1878, applied to and embodied in the Order in Council of May 16, 1878. Section 19 of the Extradition Act, 1870, provides: "Where, in pursuance of any arrangement with a foreign State, any person accused or convicted of any crime which, if committed in England, would be one of the crimes described in the first schedule to this Act is surrendered by that foreign State, such person shall not, until he has been restored or had an opportunity of returning to such foreign State, be triable or tried for any offence committed prior to the surrender in any part of Her Majesty's dominions other than such of the said crimes as may be proved by the facts on which the surrender is grounded."

The Treaty was signed in 1876, but it was in fact ratified in April of 1878, and I have therefore called it the Treaty of 1878, though I do not know what is its exact proper designation. Art. 4 of the Treaty of 1878, which is applied by and is embodied in the Order in Council of May 16, 1878, provides that: "The present Treaty shall apply to crimes and offences committed prior to the signature of the Treaty; but a person surrendered shall not be tried for any crime or offence committed in the other country before the extradition, other than the crime for which his surrender has been granted."

It was argued by Mr. Eddy that those words in Art. 4 abrogated or repealed or in some way dispensed with the power which was contained in the last two lines of section 19 of the Act of 1870 to try a person for any extraditable offence which was proved by the facts on which the surrender of such person was grounded. We do not assent. In our view this contention is wrong, and assuming here a surrender made under the extradition law, it must have been based upon the facts contained in the information and depositions, which disclose not only the offence of obtaining money by false pretences, but facts by which fraudulent conversion

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of such moneys may be proved. The Court bases its decision upon this ground, and this is sufficient to dispose of the appellant's first grounds of appeal, but the majority of the Court is not satisfied that in this case there was in fact any extradition or surrender at all.

The facts are a little difficult to ascertain, and indeed, even now what really happened is not quite clear. Mr. Eddy has over and over again invited us to assume that certain things must have happened, but even if it were to be assumed that everything happened as he suggests, it by no means follows that the facts are such that his contention in law is correct.

In considering what the facts are, and what they amount to in point of law, it must always be borne in mind that the burden of proving such facts as will establish his contention in law, rests upon the accused who was before the Central Criminal Court on September 9 in lawful custody upon the lawful committal of a Metropolitan magistrate, before whom he had been brought upon a lawful warrant issued by him. There was nothing in fact or in law apparent to the court to prevent the court from proceeding to try him upon an indictment which had been found by the grand jury, and if he desired to prevent the court from proceeding to his trial, the burden was upon him to show beyond reasonable doubt that such facts existed as would render his trial by the law of England illegal and improper.

In the view of the learned Commissioner, he failed to prove this.

The facts stated before the Commissioner were as follows: On October 21, 1929, one of the magistrates of the police courts of the Metropolis issued his warrant to each and all of the constables of the Metropolitan Police Force commanding them to bring Kettering Edward Cassidy before the court of summary jurisdiction sitting at the Marlborough Street Police Court forthwith to answer an information which had been laid by Derek Dakeyne Cannon

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and William Winter, alleging that the said Cassidy between May 2, 1929, and July 11, 1929, did unlawfully by false pretences with intent to defraud obtain of and from the said Cannon the sum of £4,900. Kettering Edward Cassidy was a name by which the appellant was known.

On November 13, 1929, the appellant was arrested in Paris by the French police. No information was before the Court how he came to be arrested, except the statement of the prisoner himself, that "I was arrested upon an extradition warrant from England in the case of Derek Dakeyne Cannon."

We are asked to assume that such arrest was made by the French police in consequence of a request by the British Government, and that such request was formulated under the statutes, Orders in Council and Treaties relating to the extradition of fugitive offenders. It may be that it is so, but there was certainly no evidence of such facts before the court. No document which could in any way be described as "an extradition warrant," which was mentioned by the prisoner, was before the court, and as far as we can ascertain, no such document ever existed.

Having been arrested, the prisoner was taken, according to his own evidence, five times before a French court, where, according to his own account, "they asked me if I wished to be extradited. My counsel was there and specified the charge, and I was told by the French judge that the charge was obtaining money by false pretences. I particularly asked the Judge to specify the charge in detail. Upon that charge I consented to be extradited."

After the prisoner's arrest, namely, on November 18, 1929, two other warrants were issued by the Metropolitan magistrate for his arrest upon two other charges of obtaining money by false pretences. With reference to these, the prisoner said in evidence: "I was sent for by the Public Prosecutor, who showed me two additional warrants which had been sworn after the first one in

London in connection with the case of Mrs. Harrold and Mr. Noad. I again asked the specific charge, and I was told, and it was read out to me and I signed the document that I was charged with obtaining money by false pretences with intent to defraud. Upon that charge I agreed to be extradited instead of opposing it, and upon that charge only. I now find I am being charged with fraudulent conversion."

Here again the evidence, or rather, the lack of evidence, is remarkable. The prisoner states that he was taken five times before a French court, that the charges were read out to him, and that he in fact signed documents. No document whatever is produced before this Court, and no information whatever is before the Court of the nature of the proceedings which the prisoner refers to in his evidence.

He goes on to state that after appearing before the French authorities, as above mentioned, "I was taken from Paris in the prison van. I was in a van four days, I arrived at Boulogne at 6.20, a police officer took me over at 6.25 I think, and I was in the boat at 7 o'clock. An order was made in the court in Paris for my extradition."

Upon this statement being made, the learned judge at the trial pointed out, and pointed out quite properly, that if an order was made, the order should be produced, and the accused went on to say: "I was informed that the Minister of Justice there sanctioned my extradition, and I then pressed the Foreign Office here to extradite me as quickly as possible because I did not wish to be there any longer than I could possibly help."

There is in all this account no proper legal evidence to show that extradition proceedings were ever taken against the accused, or that the stages leading up to and appropriate to a surrender under the extradition law were taken; but the absence of evidence does not cease there. The only communication passing between the Government of this country and the Government of France which has been

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produced to the Court is a letter from the French Government dated January 6, 1930, which states: "On referring to the note of the English Ambassador of the 23rd November last, the Minister of Foreign Affairs has the honour of stating that the man named Corrigan, Michel Dennis, has consented to be sent back without the fulfilment or accomplishment of the formalities of extradition. The new warrants transmitted to date have been shown to him, and he maintains his determination to dispense with the formalities and diplomatic guarantees, and that his transfer may take place at once." There is no other document showing that any request, or what request was made by the British Government, nor showing that any order was made by the French Government extraditing him, or, if extraditing him, upon what charges he was in fact extradited.

Upon these facts the prisoner contended that he had been surrendered to the police of this country under the extradition laws, and that he was entitled to any safeguards which the Statutes, Orders and Treaties afforded to extradited persons.

As I have said, we are all agreed that having regard to section 19, the prisoner was properly triable here for fraudulent conversion. The majority of us further think that the learned judge was right in coming to the conclusion that on this evidence the prisoner had not made out that he was surrendered under the extradition law, but that he returned voluntarily, although in custody, to this country to face any charges made against him.

With regard to the second group of grounds of appeal in this case, the appellant alleges that there was a misreception of evidence; that there was misdirection of the jury by the learned Commissioner, and that there was non-direction of the jury.

In order that those contentions may be appreciated, it is necessary to state very briefly—and indeed they may

be stated very briefly—the main facts against the accused. The allegation against him was that he obtained from a Mrs. Harrold and a Mr. Noad over a period of time very considerable sums of money, amounting to many thousands of pounds, by falsely representing and pretending to them that he was engaged in some business connected with the Standard Oil Company, and that by entrusting him with their money he was in a position to procure for them shares in that Company upon extremely advantageous terms. Having obtained the money from them, money running into, as I say, many thousands of pounds, he did not in any form or shape invest it on their behalf, but he used it for his own purposes, and the jury came to the conclusion—and, indeed, on the evidence they could have come to no other conclusion—that he had fraudulently converted it to his own use.

In the course of the trial, whilst these facts were being laid before the jury, evidence was given that at one time the prisoner had been made a bankrupt. The evidence did not disclose, I think, that he was a bankrupt at the time that the facts were occurring which were the basis of the charges of the prosecution against him, but it was proved that at one time he had in fact been adjudicated a bankrupt. It is said that that evidence ought not to have been given because it was irrelevant to the issues of fraudulent conversion which were before the jury. I cannot follow that contention. The history of the case was that the prisoner was posing before the victims of his fraudulent pretences and fraudulent conversion as a wealthy man, and as part of the history of the case it was the duty of the prosecution to show that he was not a wealthy man at all, but that, on the contrary, at very material times he was a person who had been adjudicated bankrupt, and was occupying the status of a bankrupt. It is very remarkable to observe that when that evidence was given, and it was given at a period long after the discussion which we have

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just been dealing with, *viz.*, what the man was charged with, and whether he could or could not be charged with the particular offences with which he was charged, when it was quite clear to the minds of those advising him what the issues, and the only issues, for the jury were, no objection was taken to the evidence which was tendered on behalf of the prosecution. It was given without the slightest comment being made in opposition to it, and without any cross-examination, at any rate, of one of the witnesses by the counsel for the defence. We cannot think that this evidence was inadmissible. If it had been inadmissible, in the circumstances we do not think that it could possibly be said to have adversely affected the result of the trial, and in any event there is nothing in this which gives any ground for allowing this appeal.

With regard to the misdirection, it is pointed out that in a particular passage the learned Commissioner in telling the jury what amounted to fraudulent conversion, did not actually use the word "fraud." I agree that in the particular passage to which our attention was called, he did not use the word "fraud" or "fraudulent," but he put before the jury a state of facts which, if they were true, could compel ordinary reasonable people to but one conclusion, and that was that what had been done had been done fraudulently.

If the matter stood there, I should have hesitated a long time before I thought that in that there was any misdirection, but, indeed, it does not stop there, for within a few sentences later the learned Commissioner goes on to point out to the jury that before they can convict the prisoner they must be satisfied that what he did was in truth done fraudulently.

It is said with regard to non-direction that the learned judge did not put before the jury a number of documents in support of the case of the accused that the moneys which he had received from Mrs. Harrold and which he

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had received from Mr. Noad were moneys which had been received by him not, as they said, for the purpose of investing in shares, but had been received by him for the purpose of loans. It is said that if the jury had seen the cheques and the documents which had been produced in Court and identified by the witnesses, and heard them commented upon by the learned Commissioner, they might have come to a different conclusion, and that his failure to comment upon these documents was a misdirection or a non-direction which in law amounts to misdirection. We cannot take that view. It is perfectly plain that from the beginning to the end, the defence of this prisoner that these were mere loans, and that he had made no false pretences, and he had made no fraudulent conversion, was before the jury. It was put fully, adequately and fairly by the learned Commissioner. The prisoner had the advantage at the Central Criminal Court, as he has had the advantage here, of being represented by counsel of great experience and of very great ability, who thoroughly understood his case, and who, we know for ourselves here, and believe from the shorthand notes of the trial below, put it quite properly, and as well as it could be put by anybody.

In these circumstances, in the opinion of this Court this appeal fails, and the conviction which is appealed against is affirmed.

Appeal dismissed.

An application that sentence should run from the date of conviction was refused.

T. R. F. B.

Solicitor for the appellant : L. H. Brooks.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

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EDWARD ROSS.

Joint Indictment—Habitual Criminals—Request of Defence for Separate Trials.

An allegation of being a habitual criminal must be tried separately even if prisoners are jointly tried.

Appeals against convictions as habitual criminals, by leave of the Court.

Appellants pleaded guilty at the County of London Sessions on August 6, 1930, to shopbreaking and to possessing housebreaking implements by night, and each was convicted of being a habitual criminal. They were each sentenced by the Acting-Chairman to three years' penal servitude and five years' preventive detention.

H. Elam, for appellant Lonsdale (under section 10 of the Criminal Appeal Act, 1907), who was present:

The substantial ground of appeal is that confusion was caused by the fact that the three prisoners were tried together on the charge of being habitual criminals, and the case of each was consequently prejudiced and embarrassed. The Acting-Chairman suggested that it would be better if the prisoners were tried separately, and counsel for the Crown agreed with that suggestion, but counsel who was appearing on behalf of all three prisoners expressed the desire that they should be tried together. This Court has on more than one occasion expressed disapprobation of persons alleged to be habitual criminals being tried to-

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gether: G. BLAKE, 1910, W. N. 123; 74 J. P. 336; 4 Cr. App. Rep. 275: 1910; TAYLOR AND CONEY, 5 Cr. App. Rep. 168: 1910, *s. r.*; cf. CHATWAY *v.* HOWARD, 5 Cr. App. Rep. at 153: 1910. F. WHITE AND G. SHELTON, 20 Cr. App. Rep. 61: 1927, is an instance of a recent case where "habitual criminals" were tried separately. In this case there was confusion with regard to the time when each of the appellants was out of prison, and the dates of their releases. A further confusion arose with regard to their names, because on ten out of the thirteen occasions on which Lonsdale was convicted he was convicted in the name of Baker, and one of the other appellants is also named Baker.

G. St. John McDonald, for appellant Ross, who was present:

In no two cases where persons are charged with being habitual criminals can the facts be the same. [He referred to the various matters of confusion that had arisen at the trial.] Sufficient weight was not given to a period of honest work by this appellant.

H. W. Wickham, for appellant Baker (under section 10 the Criminal Appeal Act, 1907), who was present:

The reason why an application was made that the prisoners should be tried together was that in each case it was necessary to call the other two prisoners as witnesses; if separately tried, they might not, as ordinary witnesses, have had the protection of section 1 of the Criminal Evidence Act, 1898. BLAKE was revised soon after in TAYLOR, ETC. The characters of witnesses not co-defendants could be more deeply probed: see T. PAUL and R. MACFARLANE, 1920, 2 K. B. 183; 89 L. J. K. B. 801; 123 L. T. 336; 84 J. P. 144; 64 S. J. 447; 36 T. L. R. 418; 26 Cox C. C. 619; 14 Cr. App. Rep. 155; and cf. CONEY, 92 L. J. K. B. 915; 129 L. T. 62; 27 Cox C. C. 418; 87 J. P. 112; 67 S. J. 771; 39 T. L. R. 469; 17 Cr. App. R. 128: 1923: *prev. det. q.* In the case of this appellant also there was

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substantial evidence of honest work. The confusion in names could not be foreseen. [He was stopped.]

Frederick Levy, for the Crown:

The view of the Crown was that the accused ought not to be tried together, but the defence pressed for the adoption of that course. This Court is respectfully invited to give a definite ruling on the question whether in any circumstances persons may be tried together on the charge of being habitual criminals. It is admitted that by reason of the same names of different prisoners a certain amount of confusion was caused at the trial, but this was removed by the summing-up. The fact that work has been done by a prisoner since his last release is not conclusive evidence that he is not a habitual criminal: H. LAVENDER, 20 Cr. App. Rep. 10: 1927; WHITE AND SHELTON (above), F. WILLIAMS, 8 Cr. App. Rep. 49: 1912. It is a matter of importance that elaborate tools were used in the commission of the substantive crime. Further, two of these prisoners had been known to each other before, and were again found in association for a criminal purpose.

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AVORY, J. (*a*): In this case the appellants John Lonsdale, Edward Ross and Jack Baker were severally convicted of being habitual criminals, after they had pleaded guilty to charges of breaking and entering a shop with intent to steal and of being found by night in possession of implements of housebreaking. This case is a forcible illustration of the confusion which may arise from persons who are charged as habitual criminals being tried together upon that charge. In the case of THE KING AGAINST G. BLAKE, reported in 4 Criminal Appeal Reports 275, and also in 74 Justice of the Peace, at page 336, the Lord Chief Justice,

(*a*) From a transcript supplied by the courtesy of the Director of Public Prosecutions.

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Lord Alverstone, is reported in the *Justice of the Peace* report to have said that: "When a person was tried upon the charge of being a habitual criminal, the evidence in support of that charge must necessarily be directed against him personally, as it must largely relate to his mode and habits of life. This evidence, then, ought to be kept quite separate from the evidence against any other person. Taking this view, the Court could not conceive any case where two persons could properly be tried together upon a charge of being habitual criminals. They therefore thought it well to lay down the rule that a person charged in an indictment with being a habitual criminal, when tried on that issue, should be tried separately and not with any other person." It is to be observed that Bray, J., and Lord Coleridge, J., were the other members of the Court approving of that judgment. If that decision had rested there, as reported in the *Justice of the Peace*, no difficulty or question could have arisen, but it does appear that in the case of EDWARD TAYLOR AND ALFRED CONEY, reported in 5 Criminal Appeal Reports, at page 168, when the case of BLAKE was quoted, the Lord Chief Justice is reported to have said (p. 169): "I do not think that I intended that as a ruling. It is advisable that prisoners should be tried separately to prevent confusion in the minds of the jury. It was rather an *obiter dictum* than a ruling."

I cannot help thinking that at the time when the learned Lord Chief Justice said that he had not before him the report of his previous judgment, as reported in the *Justice of the Peace*, but only the report as reported in the Criminal Appeal Reports. Mr. Justice Darling said: "If it could be shown that there had been any confusion, this Court might interfere," and Lawrance, J., said: "There is no doubt it is better that prisoners should be tried separately upon a charge of being habitual criminals."

Now upon that state of the authorities, it is not to be wondered at that, upon the learned counsel who at that

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time appeared for all these three appellants applying specifically that they should be tried together on these charges of being habitual criminals, the learned judge, notwithstanding the proper protest which was made at that time by counsel who appeared for the prosecution, was induced to accede to the actual prayer of the counsel for the defence that they might be tried together. He no doubt believed that the learned counsel for the defence thought that it was in the interests of the three accused that they should be tried together. We cannot suppose, and we do not wish to suppose, that the learned counsel, in making that application, had any idea in his mind at the time that it would result in confusion which might afterwards give a ground of appeal; but, the learned judge having assented to the course which was proposed by the learned counsel for the defence, the trial proceeded. Before I deal with the confusion which is alleged on the part of the appellants and which is now frankly admitted by the learned counsel for the Crown, we think it right to lay down definitely the rule, and to re-establish the rule, which was apparently laid down in the case of BLAKE, according to the report in the *Justice of the Peace*—that is to say, we now lay it down definitely as a rule that no two persons should be tried together upon the charge of being habitual criminals. Where there are two or more persons included in an indictment for some other offences, each of them should be tried separately upon the charge of being a habitual criminal.

Now in this case it being admitted, as I have said, that confusion did arise, we are satisfied from the very able argument of Mr. Elam that both in the minds of the police officers and in the mind of the learned judge, when he came to sum up this case, confusion did exist, particularly with regard to the relations between the appellant Lonsdale and the appellant Baker—a confusion not unnatural in the circumstances, seeing that Lonsdale had been previously convicted in the name of

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Baker, and Baker, who was called Jack Baker at the trial, had been previously convicted with some other first name. Furthermore, beyond that confusion which gave rise to a statement by the police officers that Lonsdale had been convicted with Baker, the other appellant—which would tend to prove to the jury that they were old associates in crime—undoubtedly there was also confusion, when the learned judge cam to sum up, about the number of years that Lonsdale had been in prison, making allowance for the time of the war, when he was in the Army. The learned judge undoubtedly was misled into saying that he had been only four years out of prison in the course of thirty-six years, subtracting that period of seven years of Army service. It is not necessary to go through the details; it is sufficient for us to say that we are satisfied that such confusion existed that the jury in this case may well have been led to brand all three of these appellants with the stigma of being habitual criminals, without making any proper distinction between the three cases, especially in view of the fact that there was evidence about each of them that he had made some attempt, at all events, to earn an honest living since the date of his conviction before the one in question.

In these circumstances we have come to the conclusion that the convictions as habitual criminals cannot stand, but that the sentences of three years' penal servitude which were imposed upon each of these appellants for the substantive offences to which they pleaded guilty will stand.

Convictions as habitual criminals quashed.

Solicitor for appellant Ross: Bruce Searle.

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Breach of Recognisance in this Court.

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Breach of recognisance imposed by the Court. See p. 53, above.

Appellant was present.

W. Blake Odgers, for the Crown:

After being bound over by this Court on June 2 last, the accused remained for some months in employment at a hotel in the Isle of Wight. He did not report to the Probation Officer when he left or give him any address, but came to London in September. On October 24 he was convicted at the Brentford Police Court of the larceny of a bicycle and was sentenced to one month's imprisonment with hard labour.

A police officer was then called, who proved the above conviction, and gave particulars of the accused's recent history.

AVORY, J.: The accused has sent in a statement in which he says that his reason for stealing the bicycle was that he had obtained a situation at a hotel at Chiddingfold, and that, having no means of getting there, he stole the bicycle in order to raise money for that purpose. We are not satisfied with that explanation, and we have come to the conclusion that, in view of the fact that the leniency shown to the accused in June has evidently been misplaced, it is our duty now to remit him to the position in which he was before he entered into the recognisance. The sentence passed on him at Hants Quarter Sessions will be enforced, with this difference. This Court has more than once laid it down that, where sentence of detention in a

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10 *November.*

GRAHAM WOOD.

Avory, J.,
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Borstal institution is passed, the sentence should be for a period of three years, leaving it to the discretion of the authorities to discharge the person so detained at any earlier date. The order of the Court therefore is that the accused be detained in a Borstal institution for three years.

Original sentence confirmed: term increased.

T. R. F. B.

GEORGE FREDERICK GORE.

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GEORGE FREDERICK GORE.

Avory, J.,
Swift, J.,
Acton, J.

Breach of Recognisance in this Court—Offence of a Character Different from the Previous Offence.

Breach of recognisance imposed by the Court. See 21 Cr. App. Rep. 175.

Appellant was not in custody.

R. C. Hutton, for the Crown:

After being bound over by this Court on November 11, 1929, the accused returned home and obtained work as an agricultural labourer. On August 29 he pleaded guilty at Winchcombe Petty Sessions to doing malicious damage to a shed, and was sent to Gloucestershire Quarter Sessions with a view of sentence of detention in a Borstal institution being imposed. The Court of Petty Sessions at the same time sent a certificate to this Court, and in view of this fact and because he had already been in custody for six weeks the Court of Quarter Sessions imposed a nominal sentence of one day's imprisonment.

Appellant addressed the Court.

The Court, in view of the fact that the offence to which the accused had pleaded guilty was not one of dishonesty,

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Acton, J.

and in view of evidence given by a police officer that the accused was at present in employment, ordered the accused to be discharged upon his entering into a fresh recognisance to be of good behaviour for two years.

Sentence varied.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

1930.
11 *November.*

PERCY FRIEND.

Misdirection by Mistake in Law—Stealing within section 36 of 24 & 25 Vict. c. 96, the Larceny Act, 1861—Larceny at Common Law—Proviso to section 4 of the Criminal Appeal Act, 1907.

On an indictment for stealing under section 36 of 24 & 25 Vict. c. 96, larceny at common law cannot be found : hence the direction to the jury must make it clear that fruit, etc., the subject of the charge, was growing and had not been severed at the material time.

Appeal against conviction.

Appellant was convicted at West Kent Sessions on October 16, 1930, of stealing growing apples, contrary to section 36 of 24 & 25 Vict. c. 96, the Larceny Act, 1861, and was sentenced by the Deputy-Chairman to three months' imprisonment with hard labour.

G. A. Thesiger, for appellant, who was present :

Appellant was convicted on a count which charged him with an offence contrary to section 36 of the Larceny Act, 1861. The offence is distinct from simple larceny, for which

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there was no count in the indictment. On the indictment appellant could not be convicted of larceny at common law: GOOCH AND ANOTHER, 8 C. & P. 293: 1838 (verdict of not guilty directed); followed in MOLLOY, 1921, 2 K. B. 364, 368; 90 L. J. K. B. 862; 125 L. T. 470; 85 J. P. 233; 37 T. L. R. 611; 65 Sol. Jo. 534; 27 Cox C. C. 34; 15 Cr. App. Rep. 170: *c.q.* The apples in question were taken from an orchard by one Norman, on the instructions of appellant. The Deputy-Chairman told the jury that it did not matter whether the apples were picked from the tree or were windfalls, with regard to which there was a dispute. The distinction was material, because, on the authority of the two cases cited, appellant could on this indictment be convicted only if he had actually severed the property from the realty himself, or had aided and abetted in doing so. On the direction which they received, the jury may well have thought that they could convict appellant if he had taken apples which were windfalls. [He was stopped.]

A. L. B. Thesiger, for the Crown:

The summing-up cannot be supported, but it is submitted that in this case there was no substantial miscarriage of justice and that the proviso to section 4 of the Criminal Appeal Act, 1907, should be applied. The real issue for the jury was whether they accepted the evidence of Norman or that of appellant. There was evidence of conduct by the latter quite inconsistent with that of an innocent man and the jury accepted the evidence of Norman that he took the apples by appellant's orders, appellant being his employer. Norman stated that the apples which he took were growing on the trees. If they had been properly directed the jury would have accepted his evidence on that point, as they did on the other issues.

AVORY, J.: The offence under section 36 of the Larceny Act, 1861, is an offence punishable on summary conviction, and became indictable only because, as it is punishable by

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six months' imprisonment, the appellant had the option of being tried, and did elect to be tried, by a jury. The exercise of that option did not alter the character of the offence, and the fact of its being tried on indictment did not convert the offence into the offence of larceny at common law.

At the trial there was undoubtedly raised before the jury the issue whether the apples taken from the orchard were picked from a tree or were picked up from the ground after they had fallen. If they were apples picked up from the ground, they were not the subject of an offence under section 36 of the Act of 1861, though they might have been the subject of larceny at common law. The Deputy-Chairman, in his summing-up, made a most unfortunate slip when he told the jury in plain terms that it did not matter one bit whether the apples were picked from a tree or were windfalls. It is frankly and properly admitted on behalf of the Crown that that direction in law cannot be supported, and was a misdirection. The Deputy-Chairman ought to have told the jury that, to support this indictment, they must be satisfied that the apples were picked from the tree while growing. There was in this case ample evidence on which, if the jury had been properly directed, they might have come to the conclusion that the appellant was guilty of the offence of stealing growing apples. Counsel for the Crown has suggested that the jury must be taken to have believed the witness Norman who said that he did pick the apples from a tree, and to have disbelieved the appellant when he said that, if any apples were taken by Norman, they were taken from the ground, and it is suggested that in these circumstances the Court should act on the proviso to section 4 of the Criminal Appeal Act, 1907. It is impossible for this Court to say that the jury, having that direction before them, may not have said to themselves : " We need not trouble to decide the issue whether the apples were picked when growing or were

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picked up from the ground, because in either case we think that the appellant was a party to the stealing." In view of the two authorities which have been cited to us, GOOCH and MOLLOY, it is clear that the appellant could not properly be convicted of larceny at common law; but the jury may have had it in mind to convict of an offence which would be larceny at common law and not an offence under the statute. In these circumstances, we are constrained to say that there was such misdirection that this conviction cannot stand; the appeal must be allowed. It may be that the appellant is still liable to be indicted for the offence of larceny at common law, in respect of which he has never been in peril.

Conviction quashed.

T. R. F. B.

Solicitors for appellant: W. E. Agg-Large & Co., Rochester.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

SIDNEY FREEDMAN.
WOOLF FREEDMAN.

1930.
12 *November.*

Knowingly Receiving Stolen Property—Presence of Accused on Premises Containing the Property Recently Stolen—Possession or Control Actual or Presumptive—Evidence equally Consistent with Guilt or Innocence.

To sustain an indictment for knowingly receiving stolen property some possession or control must be proved.

Evidence of intention to commit a crime is not sufficient for a conviction of that crime.

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SIDNEY FREEDMAN.
WOOLF FREEDMAN.

Avory, J.,
Swift, J.,
Acton, J.

Appeals against convictions and sentences, by leave of the Court.

Appellants were convicted at London Sessions on September 25, 1930, of knowingly receiving stolen goods, and were each sentenced by the Acting Deputy-Chairman to nine months' imprisonment in the second division.

W. E. Batt, for appellants, who were present:

The appeals against sentence are abandoned. Appellants, on the arrival of the police, according to their evidence, attempted to run away from a house to which the stolen property had been taken, but there was no evidence that they were ever in the room in which the stolen property was, or were ever in possession or control of it. [He was stopped.]

J. C. Maude, for the Crown:

There is no evidence to show that appellants went beyond the door of the room where the stolen property was; but it is submitted that the fact that they ran away from the house when the police arrived and were found in hiding, combined with the fact that there was in a room of the house a considerable quantity of the stolen property, and the fact that though they had an immediate opportunity of explaining their presence at the house, they gave no explanation at that time, were sufficient to justify the convictions.

AVORY, J.: Stolen property was found in the back room of a house, and the appellants undoubtedly were in the house at the time when the police arrived on the day after the property had been stolen. So far as these two appellants are concerned, the whole question is, whether there was evidence from which the jury could properly draw the inference that they were in either actual or constructive possession of any part of this stolen property. Counsel for the Crown has quite fully explained to us the

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SIDNEY FREEDMAN.
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grounds on which the jury probably came to the conclusion that the appellants were guilty of being in possession of this stolen property, knowing it to have been stolen; but we have to consider whether there was any evidence on which they could properly come to that conclusion. If the evidence is all consistent with these men having gone to the premises with the knowledge that they would find some goods which they might buy very cheaply—or even with the knowledge that the goods were actually stolen—with a view to dealing with them in some way, the question still remains whether at the time they had assumed control over the goods. The only evidence from which that inference could be drawn was the evidence of the police that they were seen "leaving the vicinity of the door of this back room," and that they immediately ran down the stairs and concealed themselves. That evidence is consistent with the view that they had gone to the premises with an unlawful intention in their minds, and that their conduct resulted from an uneasy conscience, but it is not sufficient to satisfy the requirements of the indictment. It had to be established not that they were going to assume control or take possession of the goods, but that they had actually done so.

In the circumstances, although we have no moral doubt that the appellants were on the premises for an unlawful purpose, we have come to the conclusion that there was no sufficient evidence that they had any actual or constructive possession of any of the stolen property, and that the convictions cannot stand.

Convictions quashed.

T. R. F. B.

Solicitors: J. A. Davis, for appellants; Wontner & Sons, for the Crown.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE ROWLATT AND MR. JUSTICE McCARDIE.

1930.
17 *November.*

JOSEPH BISHOP.

Severity of sentence, after several previous convictions.

Appeal against one sentence, and application for leave to appeal against another sentence.

Appellant was convicted at Birmingham City Sessions on October 6, 1930, of attempted burglary and of possessing housebreaking implements by night and was sentenced by the Recorder to eighteen months' imprisonment with hard labour and to five years' penal servitude (concurrent). Leave was given to appeal against the sentence of penal servitude.

Appellant in person.

No counsel appeared for the Crown.

AVORY, J.: Appellant is only thirty years of age, but has a bad record. He was convicted first in 1924 of larceny, and since then he has been convicted every year either of assault or of offences of dishonesty. In 1928 he was sentenced to twelve months' imprisonment for burglary. The police gave him a very bad character, but, in view of all the circumstances of the case, we have come to the conclusion that the sentence of five years' penal servitude may properly be reduced to one of three years' penal servitude, to run from the date of conviction.

One sentence reduced.

T. R. F. B.

THOMAS WILLIAMS.

1930.
17 *November.*

THOMAS WILLIAMS.

Avory, J.,
Rowlatt, J.,
McCardie, J.

Severity of sentence, in view of recent good character.

Appeal against sentence.

Appellant pleaded guilty to larceny at Glamorganshire Sessions on October 14, 1930, and was sentenced by the Chairman to five years' penal servitude.

No counsel appeared and appellant was not present.

AVORY, J.: Appellant pleaded guilty to stealing £2 7s. 6d., the property of a fellow-workman in a colliery. The sentence was, no doubt, passed in view of the appellant's previous record. He had been convicted before on several occasions of larceny and once of arson, for which he received a sentence of three years' penal servitude. From that sentence he was released in October, 1929.

On the other hand, evidence was given on his behalf by a woman from the Salvation Army, who gave him a good character for the last eleven months and said that the Salvation Army had been able to find work for him till September, 1930. At the time of the offence he was out of work. In the circumstances of the case, we think that the sentence was excessive, having regard to the nature of the offence, and that it should be reduced to a sentence of eighteen months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

1930.
17 *November*.

JAMES WILLIAM McLOCKLIN.

JAMES WILLIAM McLOCKLIN.

Avory, J., Rowlatt, J., McCardie, J.

Identification by One Witness—Contradictory Statements by Material Witness—Verdict not Supported by the Evidence.

Where the only witness to identification of the accused has at one time expressed doubt about his own correctness, the attention of the jury ought to be drawn to this fact.

Appeal against conviction.

Appellant was convicted of office-breaking and larceny at Nottinghamshire Sessions on October 13, 1930, and was sentenced by the Chairman to four months' imprisonment with hard labour.

A. M. Lyons, for appellant, who was present, on bail:

The case against the appellant rested upon identification by a man named Hudston, who had been assaulted and robbed during the night. He at first expressed doubt with regard to the identity of the appellant and said that he had not switched on the light when he was assaulted. These matters were not dealt with accurately in the summing-up, and the case for the defence was never put to the jury. [He was stopped.]

Tinsley Lindley, for the Crown:

There was sufficient evidence of identification for the jury to convict.

AVORY, J.: The appellant was convicted solely on the evidence of one witness, who professed to identify him. That witness admitted that the assault was committed upon him when he was about to switch on the light, and he therefore was not able to see clearly who his assailant was. Further, it was proved that this witness, before he gave evidence, had admitted that he was not certain who was the person who had struck him. The case was left to the jury, as if the only questions were whether they

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17 *November.*

JAMES WILLIAM McLOCKLIN.

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McCardie, J.

could doubt the evidence given by this witness at the trial, when he swore that the appellant was the man who had attacked him. It is significant that at the time when this witness was expressing some doubt a police officer, no doubt without any improper motive, said to him: "Well, we can't act unless you are positive," and that by the time the witness came to give his evidence, he was positive. The Chairman, in his summing-up, made no reference to the doubts expressed by the witness. In our opimon, the verdict here was one, which in the words of section 4, sub-section 1 of the Criminal Appeal Act, 1907, "cannot be supported having regard the evidence," and the conviction must be quashed.

Conviction quashed.

Solicitors for appellant: H. B. Clayton & Son, Nottingham.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE ACTON AND MR. JUSTICE TALBOT.

NEVILLE BROWN.

1930.
24 *November.*

Joint Indictment—Acting in Concert—Direction.

On an indictment against more than one person the summing-up must discriminate carefully the case against each defendant.

Appeal against conviction, by leave of the Court.

Appellant was convicted of larceny at the Derbyshire Sessions on October 8, 1930, and was sentenced by the Deputy-Chairman to three years' detention in a Borstal institution.

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24 *November.*

NEVILLE BROWN.

Avory, J.,
Acton, J.,
Talbot, J.

Henrietta L. M. Gibbs, for the appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was convicted with a man named Siddall of stealing tools from a motor car in the yard of a public-house. Siddall pleaded guilty. There was no evidence that appellant had taken any part in the larceny, or was acting in concert with Siddall, and the jury were not properly directed on this point. [She was stopped.]

E. L. Hadfield, for the Crown:

The question whether the appellant and Siddall were acting in concert was fairly left to the jury.

AVORY, J.: There was no satisfactory evidence that the appellant took any active part in the larceny of the tools. Even if the evidence of the owner of the motor car and tools be accepted, it was quite consistent with the account given by the appellant, that he had merely followed his acquaintance Siddall out into the yard at the back of the public-house, where the car was, and that, as he was approaching the place where the car was, and where Siddall had, by his own confession, removed the tools to the running-board of the car, the owner came out and took it for granted that the appellant was taking part in the theft. The Deputy-Chairman, in his summing-up, omitted to leave to the jury the crucial question—whether they were satisfied on the evidence that the appellant was acting in concert with Siddall. There was no evidence that the appellant was keeping watch, and no evidence which was not consistent with his own story. In these circumstances, we think that the jury were not properly directed, and that the verdict cannot stand in view of the evidence. The appeal must be allowed and the conviction quashed.

Conviction quashed.

T. R. F. B.

PERCY DOBSON.

1930.
24 *November.*

PERCY DOBSON.

Avory, J.,
Acton, J.,
Talbot, J.

Severity of Sentence.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at the Rotherham Sessions on October 23, 1930, to assault occasioning actual bodily harm, and was sentenced by the Recorder to three years' penal servitude.

John Neal, for appellant, who was present:

The offence was committed under the influence of drink. Appellant threw a bottle into, and hit the landlord of, a public-house, in which he was, with the unforunate result that the landlord lost his eye. There was no evidence of any malice or ill-feeling on the part of appellant towards the landlord. Appellant has an excellent character as a workman, and has not been convicted of any serious offence.

No counsel appeared for the Crown.

ACTON, J.: The evidence was that the appellant threw some glasses across a tap-room, and that the landlord, who had been on perfectly friendly terms with the appellant, came across on hearing the noise. It was not suggested that what ensued was a deliberate or malicious attack on the landlord, but the appellant took up a bottle, threw it, and struck the landlord. Most disastrously he caused a wound to the landlord's eye, and it was found necessary to remove it.

With regard to the appellant's previous history, it is true that there are a number of summary convictions against him, but the last occasion on which he was convicted of any offence associated with violence was in March, 1916, when he was fined for a common assault. He has produced

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24 *November.*

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testimonials extending over the last ten years, one relating to continuous employment for nine years, and is given a most admirable character. There can be but little doubt that those comparatively trifling offences of which he has been convicted were due to over-indulgence in drink. It is to be hoped that this case and its disastrous consequences will prove a life-long lesson to him. In the circumstances of the case, the Court is of opinion that the sentence ought to be reduced, and a sentence of twelve months' imprisonment with hard labour substituted.

Sentence reduced.

Solicitors for appellant : Arthur Neal & Co., Sheffield.

T. R. F. B.

The Court (Avory, Swift and Acton, JJ.) also sat on December 1.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

1930.
8 *December.*

STANLEY CARMICHAEL.

Attempt—Provocation—Sentence.

Severity of Sentence.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at Liverpool Assizes on October 30, 1930, to throwing corrosive fluid with intent

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8 *December.*

STANLEY CARMICHAEL.

Avory, J.,
Swift, J.,
Acton, J.

to burn, and was sentenced by Humphreys, J., to six years' penal servitude.

J. C. B. Lloyd, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present:

The offence to which appellant pleaded guilty is usually one of great gravity, but in the present case there were exceptional circumstances. For some months appellant had been keeping company with a girl, of whom he was very fond, and about five days before the crime they quarrelled. She then commenced an annoying course of conduct towards him, which so worked on his feelings as to drive him to a state of frenzy, and ultimately, upon her saying that she would have nothing more to do with him, in a burst of passion he threw the acid at her. Fortunately, no injury was caused to her. The learned judge said:—

"There are, in my opinion, no mitigating circumstances in this case. You did it deliberately; you wrote a letter beforehand threatening her that unless she did what you wanted you would do this thing and that you had bought the vitriol for the purpose. After you had thrown the bottle of vitriol at her and had been arrested your only statement to the police officer was one of regret that you had not done all you had intended to do. In search of mitigating circumstances the only thing I can find is something which in truth does not redound to your credit at all and that is that in fact . . . you did her no harm. . . . But I do take it into consideration and I substantially lessen your sentence on account of that fact because it does, in my view, reduce your crime rather to the category of attempts than the category . . . of completed crimes and you are entitled, fortunately for yourself, to have it remembered that you really only attempted to burn and disfigure this poor girl. Your excuse is one to which I can pay no attention at all. I cannot allow it to be thought for a

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8 *December*.

STANLEY CARMICHAEL.

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moment . . . that it is the smallest excuse for such a dastardly crime."

The girl has since forgiven appellant, and wishes to marry him, and has expressed her regret for the wrong she did him. Appellant is twenty-seven years of age, and before this offence bore an excellent character.

No counsel appeared for the Crown.

AVORY, J.: Although it is true that this offence is one which usually deserves severe punishment, every case must be judged according to its particular circumstances. In this case there are circumstances which satisfy us that this sentence was excessive and ought to be reduced.

In the first place, the person most interested, the girl, admits that she had, in a kind of fit of vanity, to use her own words, done everything that she could to provoke and annoy the appellant for some time before this event, and for the mere purpose of making him jealous had consorted with other young men and done everything, as she now regrets, to provoke a man who obviously was genuinely in love with her. The result was that, after writing some letters, he did make this wicked attempt, as the judge himself describes it, to do her some harm, but he threw the acid in such a way that in fact none of it caused any injury to her. The subsequent attitude of this girl shows that she herself admits that, to a great extent, she was responsible for what he did, and she has declared solemnly on oath that she feels no resentment towards him and is willing to marry him. We think that the learned judge did not give sufficient effect to the peculiar circumstances of this case, and we have come to the conclusion that the sentence ought to be reduced to one of eighteen months' imprisonment.

Sentence reduced.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE ACTON.

WILLIAM BRUCE HUGHES.
THOMAS HENRY ADAMS.

1930.
15 *December.*

Sentence reduced in view of appellant's youth.

Application for leave to appeal against conviction and sentence, and appeal against sentence.

Applicant (Hughes) and appellant (Adams) were convicted at Hampshire Assizes on November 18, 1930, of attempting to choke a female with intent to have carnal knowledge of her and were sentenced by Finlay, J., to four years' penal servitude and three years' penal servitude respectively.

Applicant was not present, and no counsel appeared for him.

Appellant in person.

No counsel appeared for the Crown.

AVORY, J.: It is clear that both Hughes and Adams were properly convicted of this very grave offence. There would have been no ground for interfering with the sentence for such a gross outrage in either case, were it not for the fact that Adams is reported to be only seventeen years of age. Hughes is twenty-one years of age or more, and in his case the sentence will stand. With regard to Adams, in view of the fact that he is apparently only seventeen years of age, we have had anxiously to consider whether we should make any alteration in the sentence. The offence itself thoroughly deserved such a punishment. We have also considered whether it would be possible, in the circumstances, to substitute for the sentence an order that

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15 *December*.

WILLIAM BRUCE HUGHES.
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Avory, J.,
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he should be detained in a Borstal institution, but we are unable to satisfy ourselves that he is brought within the provisions of the relevant statute. In his case, therefore, in view of his youth, we have decided to substitute a sentence of eighteen months' imprisonment with hard labour.

One sentence reduced.

T. R. F. B.

TALIESON JOHN MORDECAI.

1930.
15 *December*.

TALIESON JOHN MORDECAI.

Avory, J.,
Swift, J.,
Acton, J.

Summing Up—Inaccuracies—Omissions.

The direction to the jury should deal with defendant's explanation of facts alleged against him.

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted at Glamorganshire Assizes on November 14, 1930, of manslaughter due to the driving of a motor-van, and was sentenced by Charles, J., to three years' penal servitude and to suspension of driving licence for twenty years.

W. S. Morrison, for appellant, who was present:

There was, in substance, no allegation against appellant, except that of excessive speed. In his summing-up, the judge was inaccurate in referring to the evidence on a number of points, especially when he dealt with the evidence of appellant's conduct after the accident. The sentence was excessive, in view of appellant's previous good record.

Godfrey Parsons, for the Crown:

It is true that the judge did not specifically mention to the jury certain explanations given by the appellant with regard to the manner in which the accident occurred and his subsequent conduct, but there was evidence that the

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15 *December.*

TALIESON JOHN MORDECAI.

Avory, J., Swift, J., Acton, J.

van was being driven at a speed which rendered the conduct of appellant criminal negligence.

AVORY, J.: There were certain features of the case which were impressed on the jury by the judge as being evidence of the kind of recklessness in driving the van which would amount to criminal negligence. One fact on which great reliance was placed by the prosecution was that a lamp of the van on the near side had been broken by the collision and that broken glass from that lamp was found in the road ninety-three feet away from where the body of the deceased was found lying. Another point much stressed by the judge in his summing-up was that it was suggested that the appellant, after knocking down the deceased, had gone on for some considerable distance and had not returned till twenty minutes later. In view of the fact that these matters were emphasised by the judge in his summing-up, it has been necessary for us carefully to consider whether, when looked at as a whole, the summing-up adequately conveyed to the jury the answers which the accused made, either in his evidence or through his counsel, to these suggestions. [His Lordship then reviewed the evidence in detail, and the passages in the summing-up referring to it, and continued:] On consideration of the whole case, without expressing any opinion of what the proper verdict would have been if there had been a proper direction to the jury in which the appellant's explanations had been adequately dealt with, we are constrained to say that in this case there was such misdirection, in the shape of omission, in the summing-up that the verdict cannot stand. The appeal, therefore, is allowed and the conviction quashed.

Conviction quashed.

Solicitors for appellant: J. M. Napier, for C. James Hardwicke & Co., Cardiff.

T. R. F. B.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SWIFT AND MR. JUSTICE CHARLES.

1930.
19 *December.*

VICTOR EDWARD BETTS.
HERBERT CHARLES RIDLEY.

Joint Indictment — Robbery with Violence — More than one assailant present—Aiding and Abetting—One abettor not consenting to murder.

In the case of a common design to commit robbery with violence if one prisoner causes death while another is present aiding and abetting the felony, as a principal in the second degree, both are guilty of murder although the latter had not specifically consented to such a degree of violence as was in fact used.

Appeals against conviction.

Appellants were convicted of murder at Birmingham Assizes on December 5, 1930, and were sentenced to death by Mr. Commissioner Mitchell-Innes, K.C.

Salt, for appellant Betts (under section 10 of the Criminal Appeal Act, 1907), who was present:

The facts of the case were that an elderly man named Andrews was carrying a bag containing a large sum of money on behalf of his employers. He was attacked by Betts, who snatched the bag; Ridley was meanwhile waiting for him in a motor car a little distance off. The deceased man sustained terrible injuries, but the evidence was compatible with Betts having struck only a slight blow with his fist and the injuries having been caused by the deceased striking the pavement in his fall. If Betts could not reasonably have believed that the blow was likely to cause Andrews' death or grievous bodily harm, he was guilty

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VICTOR EDWARD BETTS.
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only of manslaughter, and the jury should have been so directed.

[He referred to SERNÉ, 16 Cox C. C. 311: 1887; and WHITMARSH, 62 J. P. 711: 1898.]

A. P. Marshall, for appellant Ridley (under section 10 of the Criminal Appeal Act, 1907), who was present:

The case for Ridley has always been that he was in a different position from that of Betts. Before they could convict Ridley of murder the jury had to be satisfied that he was united with Betts in a common design not merely to take part in a robbery, but also to be a party to such violence as, in the contemplation of a reasonable man, might cause death or at least grievous bodily harm to the intended victim. [He referred to 1 East P. C. 256, 257; *Russell on Crimes* (7th ed.) 124, 125; COLLISON, 4 C. & P. 565: 1831; FOSTER, Crown Cases 369; WHITE AND RICHARDSON, Russ. & Ry. 99: 1806; BERNARD, 1 F. & F. 240: 1859; Special Commission.] The Commissioner should have directed the jury to distinguish the case of Ridley from that of Betts, and have told them it was open to them to find Ridley guilty of manslaughter only, even though they found Betts guilty of murder: HOPPER, 1915, 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. 381; 79 J. P. 335; 59 S. J. 478; 31 T. L. R. 360; 11 Cr. App. R. 136: manslaughter substituted for murder.

Sir Henry Maddocks, K.C. (*M. F. Healy* with him), for the Crown, was only called on to deal with the point that the Commissioner had failed to direct the jury that they might convict Betts of murder and Ridley of manslaughter only:

The same objection to the summing-up as has been taken in the present case was taken in RUBENS, 2 Cr. App. Rep. 163: 1909; and was held there to be bad. In this case, the jury may well have taken the view that Ridley was aiding and abetting Betts in robbery with violence without any limitation. The Commissioner made it quite clear to

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the jury that in one set of circumstances Ridley would be guilty of murder and in another set of circumstances of manslaughter.

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AVORY, J. (*a*): The material facts of this case were not in dispute. These two appellants, knowing that the deceased man was in the habit of taking money to the bank, and knowing the route which he took to the bank, agreed together to waylay him and rob him. According to a statement made by Ridley before the trial, they agreed that he should be pushed down and the bag of money stolen from him; and in pursuance of this agreement, on the day in question they hired a motor car with which they drove to a place that they knew the deceased man would pass. Ridley remained in the car at the corner of a certain street, while Betts alighted from the car, waylaid the deceased man as he came with a bag with £900 in it, and Betts seized the deceased man by the neck and struck him a violent blow on the top of his head, either with his naked fist, or with a clenched fist with something in it. The result of that blow, according to the evidence of the medical witnesses, was to cause an actual depression of the skull bone just above the left ear, nearly at the top of the head. As a result of the character of this depression of the bone, the medical witnesses, two of them at least, were of opinion that there must have been some weapon or implement of some kind used in addition to the naked fist. One of the medical witnesses said it was possible, but highly improbable, that it could have been done with the fist alone, and the result of that blow was that the deceased man fell immediately forward on to the pavement; and although it was at one time suggested that the injury to

(*a*) This judgment is a *verbatim* transcript supplied by the courtesy of the Director of Public Prosecutions.

his head might have been caused by his falling against the railings at the side of the pavement, that view has not been pressed upon us to-day, and does not appear to have been pressed at the trial, for the evidence plainly showed that the deceased man was found lying in the middle of the pavement; and although it was suggested at the trial that the injury to the skull which undoubtedly caused death may have resulted from the fall on the pavement, all the medical witnesses who were called were of opinion that there was nothing in the nature of the pavement which could have accounted for that peculiar depression of the bone of the skull, and that it must have been caused by a direct blow, given either with the fist, or with some implement in the fist. The deceased man never regained consciousness and died shortly afterwards. Betts, having possessed himself of the bag, immediately made his way to the motor car which was waiting for him, with the door ready open in order that he might get in quickly, and the two appellants drove away with that bag of money, and it is not necessary to go through the details of their movements afterwards. It is admitted, and was admitted at the trial, that they divided that money between them, and then left the neighbourhood, and were not arrested for some considerable time afterwards when they were found at Brighton where they had been squandering this money.

Upon that state of facts proved beyond controversy, Betts, the appellant, did not give evidence at the trial. Ridley, having made certain statements before the trial, one of which I have mentioned, gave evidence and put forward a case that, while admitting he had been a party to the agreement that this man should be robbed, he only agreed or only anticipated that he would be pushed and the bag snatched from him, and that he was not a party to any agreement that violence of any kind should be used. Being pressed in cross-examination, he in more than one instance admitted that what it came to was that he left it to Betts to

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carry out this nefarious scheme; and it is quite obvious, and must have been obvious to the jury, that such a scheme, to rob a man who was in the habit of carrying money to the bank in a bag, could not be carried out without the probability, at least, of violence having to be used in order to get possession of that money.

So far as the appellant, Betts, is concerned, if the law had been laid down by the learned Commissioner in the way it has now been definitely laid down by the House of Lords in the case of THE KING *v.* BEARD (*b*), there could have been no question that the jury upon this evidence would have had no alternative but to find the appellant, Betts, guilty of the crime of wilful murder. In the case of BEARD, the accused there was charged with having caused the death of a young girl while he was committing a rape upon her. The evidence was that, in order to prevent her screaming, to stifle her cries, he placed his hand over her mouth, and his thumb upon her throat. There was no suggestion in that case that he intended to kill, no suggestion that he intended to do grievous bodily harm to her, beyond the fact that he was contemplating ravishing her; and it was suggested in that case, that in those circumstances the jury ought to have been directed that they should return a verdict of manslaughter. The Lord Chancellor (Birkenhead), in expressing his opinion on that objection, said that that objection failed, "the Court"—which meant this Court—"being of opinion (apart from the defence of drunkenness) that the evidence established that the prisoner killed the child by an act of violence done in the course of or in the furtherance of the crime of rape, a felony involving violence"; and "The Court"—that is this Court—"held that by the law of

(*b*) 1920, A. C. 479; 89 L. J. K. B. 437; 84 J. P. 129; 36 T. L. R. 379; 64 Sol. Jo. 340; 122 L. T. 625; 26 Cox C. C. 573; 14 Cr. App. Rep. 158.

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England such an act was murder." The Lord Chancellor proceeded: "No attempt has been made in your Lordships' House to displace this view of the law and there can be no doubt about its soundness." So here, if the jury had been directed that Betts, while in the act of committing a felonious act of violence against the person, as he undoubtedly was, caused death by some act done by him in the course of that felonious act of violence, then he was guilty of murder. The jury, in fact, in this case were not directed strictly on those lines, but they were directed on lines much more favourable to the accused, for they were told that if they thought in the case against Betts and the question of violence that he used, that he did an act which was calculated in the judgment of ordinary people to cause death, and in that way caused the death, then they might properly find Betts guilty of murder. In other words, it was left to the jury, as I say, more favourably than was necessary—that it was only if they were satisfied that the act which he did was calculated in the judgment of ordinary people to cause death, that they should find him guilty of murder, and the jury found Betts guilty of murder upon that too favourable description and definition of the law.

Now with regard to the case of Ridley, Mr. Marshall has, in a very able address to the Court, attempted to satisfy us that a distinction ought to have been drawn by the jury in the case of Ridley, and that the learned Commissioner ought in his direction to them, to have told them that, even though they found Betts guilty of murder, they yet might find Ridley guilty only of manslaughter. No suggestion is made that Ridley was guilty of anything less than manslaughter, or that he could properly be acquitted altogether. The only question in his case is, whether there was any misdirection of the jury in regard to his case, and whether on the facts of this case, he ought to have been convicted only of manslaughter.

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Now bearing in mind that by his own confession he was a party to the agreement that this deceased man should be robbed, and that by his own admission in his own statement he anticipated that he would, at least, be pushed down, it is necessary to see whether upon the authorities there was any ground for distinguishing his case from that of Betts.

First of all, it is clear that in the circumstances he was a principal in the second degree to the robbery with violence, which in fact took place. It is clear law that it is not necessary that the party, to constitute him a principal in the second degree, should be actually present, an eye-witness or ear-witness, of the transaction. He is, in construction of law, present aiding and abetting if with the intention of giving assistance, he is near enough to afford it, should occasion arise. Thus, if he be outside the house, watching to prevent surprise, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. It is clear that Ridley was present in that sense, so as to make him a principal in the second degree to this crime of robbery with violence; and although it might be true to say that he had not agreed beforehand that Andrews should be struck on the head in a way likely to cause his death, it is clear upon the authorities that if he was a party to this felonious act of robbery with violence—some violence—and that the other person, the principal in the first degree, in the course of carrying out that common design does an act which causes the death, then the principal in the second degree is equally responsible in law. As was said in East's Pleas of the Crown, at page 256, dealing for the moment again with Betts: "He who voluntarily, knowingly and unlawfully intends hurt to the person of another, though he intend not death, yet if death ensue, is guilty of murder or manslaughter according to the circumstances. As if A. intending to beat B. happen

to kill him, if done from preconceived malice "—if done from preconceived intention to rob with violence, it would be the same thing as if done with malice—" it will be no alleviation that he did not intend all the mischief that followed."

That being the position of Betts, what is the position of the principal in the second degree. He is at least, if not more, responsible than an accessory before the fact, and in Foster's Crown Cases, at page 369, dealing with an accessory before the fact, it is said: " Much has been said by writers who have gone before me, upon cases where a person supposed to commit a felony at the instigation of another hath gone beyond the terms of such instigation, or hath, in the execution varied from them. If the principal totally and substantially varieth, if being solicited to commit a felony of one kind he wilfully and knowingly committeth a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt . . . but if the principal in substance complieth with the temptation, varying only in circumstance of time or place, or in the manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, if present a principal." It appears to the Court in this case that the case of Ridley comes precisely within this description. Even if Betts did vary in the manner of execution of this agreed plan to rob, and obviously it must have been a plan to rob with some degree of violence, Ridley being present as a principal in the second degree is equally responsible. Therefore, in any view, if the learned Commissioner had made the distinction which is suggested between the two cases, it is obvious that upon a correct view of the law, Ridley in fact in this case was a principal in the second degree to this crime of murder. As the direction stands, and as it was given to the jury, they must, in finding Ridley guilty of murder, be presumed to have found that he was actually a party and privy to

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an act which was calculated in the judgment of ordinary people to cause death; and having so found, it is impossible that this Court, upon such evidence as this, can interfere with their verdict.

I have only to add, as was said by the present Lord Darling, in the case to which our attention has been called of MORRIS RUBENS, that there may be a distinction to be drawn, not by this Court, between the guilt of the two men; and those who have power, which this Court has not, may consider any steps which may rightly be taken in this case in making a distinction between the guilt of these two men.

The appeal is dismissed.

Appeals dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACKINNON.

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ARTHUR ERNEST DANDRIDGE.

Bankruptcy—Failure to Keep Books "Omission . . . honest and excusable."

Under section 158 of 4 & 5 Geo. 5, c. 59, the Bankruptcy Act, 1914, as amended by 16 & 17 Geo. 5, c. 7, s. 7, an omission to keep books of account though "honest" may not be "excusable."

Appeal against conviction and application for leave to appeal against sentence.

Appellant was convicted on December 10, 1930, before Judge Holman Gregory, K.C., at the Central Criminal

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Court, of having failed to keep proper books of account during the two years immediately preceding the presentation of a bankruptcy petition against him and was sentenced to four months' imprisonment with hard labour.

Harold Simmons, for appellant, who was present:

The learned Commissioner at the trial misdirected the jury by directing them that, unless appellant proved beyond reasonable doubt that his omission to keep books was honest and excusable they must convict him. Nor did he give any adequate direction what was excusable in not keeping books.

After the jury had retired to consider their verdict they sent in the following questions: "(1) If we come to a finding that defendant was honest, but without having excuse, should the verdict be guilty?" The Commissioner said that he would say "Yes" to that. The second question was: "If we find him guilty of gross negligence with no criminal intent, what should be our verdict?" The Commissioner said: "I am going to tell them that there is no such finding and they ought not to make any such finding." The latter direction was wrong.

Guilty intent is a necessary ingredient of the offence of which appellant was convicted. He was charged under s. 158 of the Bankruptcy Act, 1914, as amended by s. 7 of the Bankruptcy (Amendment) Act, 1926, 16 & 17 Geo. 5, c. 7. Section 164, sub-section 3 of the Act of 1914 provides that, where summary proceedings are taken for the offence, the Court shall consider "any evidence adduced before them tending to show that the act charged was not committed with a guilty intent." It is inconceivable that the constitution of the offence should differ according whether it is charged on indictment or summarily. It is true that in DUKE OF LEINSTER, 1924, 1 K. B. 311; 93 L. J. K. B. 144; 130 L. T. 318; 87 J. P. 191; 27 Cox C. C. 574; 17 Cr. App. Rep. 176, it was held that *mens rea* was not necessary in a charge

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of obtaining credit without disclosure while an undischarged bankrupt, but the whole essence of that decision was that the obligation imposed by section 155 of the Act of 1914 is absolute. The Legislature must have intended a different effect when enacting the wholly different language of section 158. The jury were, apparently, ready to find that appellant's intent was honest.

He also referred to A. S. PHILLIPS, 85 J. P. 120: 1921.

The sentence was excessive.

Gerald Dodson, for the Crown:

When the prosecution had proved (1) the bankruptcy; (2) the engagement in trade or business during the preceding two years, and (3) the omission to keep books, the defendant has to prove that his omission was honest and excusable. If the defendant proves that, he disproves the existence of guilty intent: the one is merged in the other. The summing-up was right and also the answer given to the second question put by the jury. The suggestion that the omission to keep books was due to negligence was never made by the defence and, therefore, no such finding was open to the jury.

Simmons replied.

THE LORD CHIEF JUSTICE: The proviso to the section under which the indictment in this case was laid contains these words: "Provided that a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section . . . if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable." The combination of epithets is a little peculiar. Honesty is a *sine quâ non* if the accused person is to bring himself within the proviso, but, clearly, the section contemplates that there may be circumstances in which the omission to keep books, although honest, is not to be excused.

The jury, when asking the question which they did,

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were, I think, distinguishing between honesty on the one hand and the other requisite—excuse—on the other hand. It may well be that the direction to the jury upon this proviso might have been somewhat more full than it was, but when the question is asked, " What did the jury mean ? " it seems that they were indicating the view that, although there was honesty in the sense of absence of any criminal intent, nevertheless there was gross negligence. Is not that another way of saying, " Honest, but not to be excused " ? The matter is not quite satisfactory, but, as it stands, the Court is not prepared to quash the conviction.

On the other hand, regard being had to the fact that the jury were apparently unanimous that appellant had no criminal intent, the sentence calls for consideration. We are told that appellant has been in custody for about five weeks and we have come to the conclusion that the imprisonment which he has already suffered is sufficient and that he may now be discharged.

Sentence reduced.

Solicitors for appellant : Leader, Plunkett & Leader.

G. F. L. B.

BEFORE

MR. JUSTICE SWIFT, MR. JUSTICE HAWKE AND MR. JUSTICE MACNAGHTEN.

1931.
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E. I. H. BASSEY.

Inns of Court—Benchers—Call to the Bar—"Defraud"—"Deceive."

The Benchers of the Inns of Court owe a duty to the public in respect of admission to the Bar: therefore a fraud committed upon them to procure such admission is a mischief against public policy none the less because its intent is not to procure money for the offender.

Appeal against conviction.

Appellant was convicted at the Central Criminal Court on November 17, 1930, of conspiracy, forgery and uttering forged documents and was sentenced by the Recorder to fourteen months' imprisonment.

S. T. T. James, for appellant who was present:

Appellant was convicted of conspiring to do an act tending to public mischief. In June, 1927, he applied to the Inner Temple for admission as a student; at a later date someone on his behalf produced at the Treasurer's office forged documents purporting to show that appellant had passed examinations at a native college in Africa affiliated to Durham University, and was a person of good character, and appellant thus obtained admission to the Inner Temple as a student. It is submitted with regard to the conspiracy charge that, if appellant did conspire, he did not conspire to do any act tending to public mischief. With regard to the charges of forgery and uttering, on which also appellant was convicted, there was no evidence

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of any intent to defraud; the evidence proved merely an intent to deceive. The state of mind of the Benchers caused by appellant's acts did not lead to their losing anything tangible.

E. Fulton, for the Crown:

It clearly amounts to public mischief if a body like the Benchers of an Inn is induced to admit as a student a person who ought not to be admitted. The Benchers of an Inn are the only body entitled to call a person to the Bar, and in so doing they act on behalf of the public. The facts of the case come within the definition of "intent to defraud" laid down by Buckley, J., in LONDON AND GLOBE FINANCE CORPORATION, LTD., *In re*, 1903, 1 Ch. 728, 732; 72 L. J. Ch. 368; 88 L. T. 194; 51 W. R. 651; 19 T. L. R. 314, approved by this Court in B. B. BENNETT & Co., 9 Cr. App. Rep. 146: 1913.

SWIFT, J.: It was argued before the Recorder and has been argued before this Court that the making of these documents for the purpose of inducing the Benchers of one of the Inns of Court to admit as a student a person whom they otherwise would not have admitted is not an act tending to public mischief. We do not think that that argument can for one moment stand. The Benchers are a body responsible to the public for the admission of students, their education and their call to the Bar, and it cannot be anything but a public mischief if in the control which the Benchers are exercising over students they are induced to act by false representations with regard to the character of persons admitted as students. An isolated case might do no injury to the public, but the question is whether the act is one which tends to public mischief, and, in our view there can be no doubt that such an act does tend thereto. On the evidence there was abundant material on which the jury could come to the conclusion to which they came, and the conviction on this count cannot be altered.

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With regard to the remaining counts, the position is a little different. It was argued on behalf of the appellant that, as the Benchers had lost no money by his act, there was no evidence of any intent to defraud. It was contended that there was at most evidence of an intent to deceive. The distinction between the two intents was mentioned by Buckley, J., in LONDON AND GLOBE FINANCE CORPORATION, *In re*: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action." In this case there was, in the opinion of this Court, evidence on which the jury might properly say that, in making these forged documents and in subsequently uttering them, the appellant intended to defraud, because he intended to induce the Benchers to act to their injury in admitting as a student a person whom, if they had known the true facts, it was not only their right, but also their duty, to exclude. The jury were properly directed on this matter, and there was ample evidence on which they could come to the conclusion to which they came. The appeal, therefore, must be dismissed.

Appeal dismissed.

The sentence was allowed to date from conviction.

Solicitor for appellant: F. G. Huggett.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACNAGHTEN.

JAMES NEVILLE.

1931.
26 *January.*

Previous Convictions—Severity of Sentence—Non-direction.

On an indictment for shopbreaking and larceny the jury should be informed of the various verdicts open to them on the evidence.

Appeal against conviction and sentence.

Appellant, after pleading guilty to one charge of larceny, was convicted on another charge of shopbreaking and larceny at Walsall Borough Sessions on December 4, 1930. He was sentenced by the Recorder to five years' penal servitude.

H. E. Kingdon, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not present:

At the trial the issue was treated as being one of identity only, and the questions whether there had been any entry or any theft, and whether the whole offence or an attempt only was proved, were never considered by the jury. They should have been directed that there was no larceny of the goods moved by appellant: "asportation" implies at least a momentary control, and he never had any control of them. The sentence was excessive, inasmuch as the value of the property involved was small.

E. A. Hawke, for the Crown:

If the Court feels any difficulty in sustaining the present verdict, it is submitted that a verdict of shopbreaking with intent to steal might properly be substituted.

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THE LORD CHIEF JUSTICE: The jury ought to have been told that it was for them to decide whether there was breaking and entering and stealing, and also with what intent the goods were moved. We think that the proper course is to substitute for the verdict of the jury a verdict of breaking and entering with intent to steal, in regard to the first charge. The amount of the property concerned was small, and although it is true that the appellant has been previously convicted on several occasions and has already been sentenced to twenty-one months' imprisonment with hard labour for shopbreaking and larceny, that is not in itself a sufficient reason for the passing of a heavy sentence in these circumstances. We do not think that the sentence can be supported, and, substituting the verdict already mentioned, we alter the sentence and reduce it to one of eighteen months' imprisonment with hard labour, which will run from the date of conviction.

Verdict substituted.
Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE MACNAGHTEN.

GEORGE HENRY JONES.

1931.
2 *February.*

Severity of Sentence.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at Glamorganshire Assizes on Nov. 24, 1930, to indecent assault on a male person and was sentenced by Charles, J., to three years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: It appears to the Court that this sentence, in view of the fact that the appellant is only twenty-two years of age, has been employed by one firm for eight years and has never been previously convicted, may properly be reduced to a sentence of eighteen months' imprisonment with hard labour, to date from conviction.

Sentence reduced.

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GEORGE BREED.

Summing Up — Adequacy — No Warning about Inadmissible Evidence.

An inadequate summing up may be a ground for quashing a conviction.

Appeal against conviction and sentence.

Appellant was convicted at Bedfordshire Sessions on December 17, 1930, of obtaining credit without disclosing that he was an undischarged bankrupt, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour.

M. D. Van Oss, for appellant (under section 10 of the Ciminal Appeal Act, 1907) who was present:

The summing-up consisted only of a few lines and was wholly inadequate. [He was stopped.]

C. E. Loseby, for the Crown, did not seek to support the conviction.

MACNAGHTEN, J.: The questions at issue on the trial were, first, whether the appellant had obtained any credit at all, and secondly, if he had obtained credit, whether he had obtained it for himself or on behalf of a firm consisting of persons other than himself. The facts of the case and the nature of the charge made it especially incumbent on the Chairman to explain clearly to the jury what was the charge, what was the evidence in support of it, and what was the answer made by the defendant. The necessity for a clear explanation was all the greater because, unfortunately, one of the witnesses called on behalf of the defendant made a statement of his own motion which indicated, or which might be thought to indicate, that the appellant was a person who had been previously convicted of crime. Nevertheless, the summing up was in fact wholly inadequate. In these circumstances the Court is of opinion that the conviction cannot stand.

Conviction quashed.

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Companies Act, 1929—*Money Lent by Company to buy its own Shares.*

Section 45 of 19 & 20 Geo. 5, c. 23, the Companies Act, 1929, was declaratory of the law and did not create a new offence.

Appeal against conviction and sentence.

Appellant was convicted on November 25, 1930, before Swift, J., at the Central Criminal Court, of publishing, as a director of a public company, false statements, and, as such director, fraudulently applying the property of the company for his own use. He was sentenced to seven years' penal servitude.

Only one point is reported.

J. P. Eddy (with him, *C. G. Armstrong Cowan*), for appellant (who was present), submitted (*inter alia*) that Swift, J., had misdirected the jury by directing them that appellant acted illegally in buying the shares of one of the companies mentioned in the charge with money lent to him by that company to enable him to do so, the object being to maintain the value of the shares in the market. The memorandum and articles of association of the company authorised the making of the loan and the transactions in question took place before the Companies Act, 1929, came into operation [Nov. 1, 1929; S. R. O., 1929, p. 142]. Section 45 of that Act, provided that "... it shall not be lawful for a company to give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase made or to be made by any person of any shares in the company [provisoes]." That section created an entirely new offence (see *Buckley's Companies Acts*, 11th ed. (1930), p. 102) and, therefore, what appellant did,

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at the time that he did it, was perfectly legal. Swift, J., failed to distinguish between a company buying its own shares which has long been held to be illegal (TREVOR *v.* WHITWORTH, 1887, 12 App. Cas. 409), and a company lending money to a director to buy its shares which was legal until the Act of 1929 came into force.

THE LORD CHIEF JUSTICE: That seems to me to be a distinction without a difference.

Eddy: There is a vital difference between a company and its directors (SALOMON *v.* SALOMON & Co., 1897, A. C. 22; 66 L. J. Ch. 35; 75 L. T. 426; 45 W. R. 193; 14 Mans. 89. If the transactions were loan transactions it could not properly be said that the company was buying its own shares.

THE LORD CHIEF JUSTICE: It seems an extraordinary doctrine that what a company cannot do directly it can do by nominees.

Eddy: The company, as an independent body, did no more than lend money to appellant. When bought, the shares remained the property of appellant.

Eustace Fulton, for the Crown (on this point only): Before the Companies Act, 1929, it had been illegal for a company to buy its own shares through a director. In such a transaction the company would be the principal and the director would be its agent to do an illegal act. Section 45 of the Act of 1929 created no new offence. It simply provided a penalty which could be imposed on persons who did something which had always been illegal.

THE LORD CHIEF JUSTICE, in the course of the judgment of the Court, said: It has been argued that there was no element of illegality in what appellant did. That argument is based on the assumption that the money was handed to appellant by the companies to buy shares in the companies. In the opinion of the Court, that course would clearly have been illegal.

His Lordship dealt with the other points raised on behalf of appellant and said that there was no ground on which the conviction could be quashed.

Appeal dismissed.

Solicitors: James R. White & Co.

G. B.

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3 *February.*

FRANCIS LORANG.

Hewart, L.C.J., Avory, J., Macnaghten, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HORRIDGE.

1931.
9 *February.*

HENRY SAUNDERS.

Sentence—Some Evidence doubtful—Previous Good Character.

When, on an appeal against sentence only, the Court is in doubt about some of the facts of the case, it may reduce the sentence.

Appeal against sentence, by leave of the Court.

Appellant was convicted at the Central Criminal Court on December 16, 1930, of conspiracy and being in possession of forged bank notes, and was sentenced by McCardie, J., to six years' penal servitude.

N. G. L. Richards, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

Appellant was convicted with two other men named Bonny and Williams on charges relating to the forging and uttering of 10s. bank notes. Evidence was given on behalf of the Crown by a witness named Morgan, that on the afternoon of October 20 the appellant was in his shop

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9 *February.*

HENRY SAUNDERS.

Hewart, L.C.J., Avory, J., Horridge, J.

and assisted Bonny in purchasing inks used in the forgeries. Application is now made for leave to call witnesses to prove an *alibi.*

The Court gave leave, and *Richards* called three witnesses who deposed that appellant was in his step-mother's house at the crucial time, and the witnesses were cross-examined by *Christmas Humphreys*, who appeared for the Crown.

Richards:

If the evidence of these witnesses be accepted, appellant took no part in these offences beyond letting the room where the forgeries were committed. His previous record was very good, and the sentence was too severe.

THE LORD CHIEF JUSTICE: The evidence of identification of this man in the purchase of inks from Morgan's premises was not satisfactory. We are not much impressed by the evidence given this morning. The fact remains, however, that he did let the room to Bonny, and the jury were evidently of opinion, as they well might be, that he knew what was going on there. In the circumstances we have come to the conclusion, in view of the man's previous record and the rather unsatisfactory character of the evidence of identification with regard to the purchase of the inks, that the sentence was too severe and we reduce it to a sentence of eighteen months' imprisonment with hard labour, to date from conviction.

Sentence reduced.

Solicitors for the Crown: Freshfields, Leese & Munns.

T. R. F. B.

WILLIAM CARL LEAF.

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WILLIAM CARL LEAF.

Hewart, L.C.J., Avory, J., Horridge, J.

Sentence — Mistaken Discrimination between two prisoners Jointly Indicted.

Severity of sentence.

Appeal against sentence: see p. 172.

Appellant pleaded guilty to larceny at Leicestershire Sessions on December 30, 1930, and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: Another man named Hubbard also pleaded guilty to this offence. He was sentenced to three years' penal servitude and has not appealed. The appellant has been sentenced already to various terms of imprisonment, but there was no sufficient reason for distinguishing the sentence passed on him from that passed on Hubbard. We therefore reduce his sentence to one of three years' penal servitude, to date from conviction.

Sentence reduced.

T. R. F. B.

1931.
9 *February.*

WILLIAM BROOKS.

WILLIAM BROOKS.

Severity of sentence.

Hewart, L.C.J., Avory, J., Horridge, J.

Appeal against sentence: see p. 171.

Appellant was convicted at Leicestershire Sessions on December 30, 1930, of receiving stolen property and was sentenced by the Chairman to five years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant was separately indicted for receiving part of the property stolen by Leaf and Hubbard. He is sixty-one years of age and has been previously convicted on three occasions. We think that this sentence also may properly be reduced to one of three years' penal servitude, to date from conviction.

Sentence reduced.

T. R. F. B.

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JAMES ALBERT HAWKES.

JAMES ALBERT HAWKES.

"*Under the influence of drink*"—*section* 15, *sub-section* 1 *of* 20 *&* 21 *Geo.* 5, *c.* 43, *the Road Traffic Act*, 1930—*Ambiguous Verdict.*

Hewart, L.C.J., Avory, J. Horridge J.

To justify a conviction under section 15, sub-section 1 of the Road Traffic Act, 1930, the jury must find not only that the defendant was "under the influence of drink" but that he was thereby incapable of the control of his vehicle.

If the terms of a verdict are ambiguous they ought to be made clear, at the instance of the Bench, when the verdict is delivered.

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9 *February.*

JAMES ALBERT HAWKES.

Hewart, L.C.J., Avory, J., Horridge, J.

Appeal against conviction, on certificate.

Appellant was convicted at Buckinghamshire Sessions on January 6, 1931, of driving a motor vehicle while under the influence of drink, contrary to section 15, sub-section 1 of 20 & 21 Geo. 5, c. 43, the Road Traffic Act, 1930, and was sentenced by the Chairman to a fine of £5. The indictment contained a second count for dangerous driving, contrary to section 11, sub-section 1 of the Act, on which the appellant was acquitted.

R. P. Winfrey, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was not in custody:

This was one of the first cases under the Road Traffic Act, 1930, and although the Chairman did in his summing up refer to the terms of the statute, it is submitted that a somewhat fuller explanation of the requirements of the statute was desirable. The words of the statute alter the entire nature of the manner in which a jury should look at a matter of this kind. The medical evidence in this case was largely favourable to the appellant, and this should have been emphasised in the summing up in more detail than it was. Finally, the verdict of the jury was ambiguous in its terms. The transcript reads as follows: "The Clerk: Members of the jury, are you all agreed on your verdict? The Foreman: Yes. The Clerk: Do you find the defendant guilty or not guilty? The Foreman: We find him guilty on the first count. The Chairman: With regard to the second count which is that of reckless driving or driving in a manner dangerous to the public? The Foreman: We find defendant guilty of being under the influence of drink. The Chairman: Then you find him not guilty on the other? The Foreman: Yes." The jury, therefore, may have thought that they could convict if they were satisfied that appellant was under the influence of drink, without having regard to the extent of that influence.

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JAMES ALBERT HAWKES.

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T. R. Fitzwalter Butler, for the Crown:

The verdict of the jury was not really ambiguous. They used the words "We find him guilty on the first count," and that finding must be read in conjunction with the summing up, where the two counts were clearly explained and differentiated by the Chairman. Counsel for the prosecution also, in his opening speech, had stated that the appellant was charged on two counts, and had explained what those counts were. The subsequent answers of the foreman of the jury are explained by the fact that the Chairman had advised the jury to concentrate their attention on the first count. There was, certainly, a direct conflict of testimony between the prosecution and the defence on many matters, but there was ample evidence on which the jury were entitled to convict.

THE LORD CHIEF JUSTICE: There was undoubtedly a great conflict of evidence in this case, and not least on the question whether the omnibus driven by the appellant was swerving from side to side of the road. The only passenger in it said that it did not swerve at all during the journey. No adverse criticism has been offered in regard to the summing up. [His Lordship referred to the verdict of the jury as set out above, and continued:] We have considered that finding with great care, but, upon the whole, and not without hesitation, we have come to the conclusion that, notwithstanding the summing up, it is ambiguous. The jury ought to have been asked whether they meant by their last answer that the appellant was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, and we cannot reject the view that, if that question had been pointedly put, they might have answered in the negative or said that they were not agreed on that point. What the jury were agreed about was that the appellant was under the influence of drink, about which much had been heard at the trial.

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9 *February.*

JAMES ALBERT HAWKES.

Hewart, L.C.J., Avory, J., Horridge, J.

In the circumstances, we have come to the conclusion, not without hesitation, that the verdict was unsatisfactory and that the conviction ought to be quashed.

Conviction quashed.

Solicitors for the Crown : Charsley & Reynolds, Slough.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

1931.
23 *February.*

WILLIAM BLAKE.
LEONARD JAMES HINES.

Severity of sentences.

Appeals against sentence, by leave.

Appellants pleaded guilty at Westmorland Sessions on January 2, 1931, to garagebreaking and larceny, and were sentenced by the Chairman to eighteen and twelve months' imprisonment with hard labour respectively.

Appellants in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE : Blake is twenty-two years of age, and has been previously convicted twice, in the year 1920. In 1926 he joined the Royal Corps of Signallers, and his conduct in the Army is said to have been indifferent. In October, 1930, he absented himself from his regiment

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WILLIAM BLAKE.
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without leave, and since then he and Hines appear to have committed a whole series of offences.

Hines is twenty-one years of age and has not previously been convicted. In 1928 he enlisted in the Army, and deserted in October, 1930. His conduct in the Army is said to have been bad. In addition to the offence charged in the indictment, the appellants admitted no fewer than twenty other offences in different parts of the kingdom. They have expressed their readiness to go back to the Army, but the Army does not want them back. It is very deplorable to see two young men in this position. We think that these sentences ought to be reduced; it is a little difficult to say to what extent, but on the whole we think it is a fair measure to reduce them by half. There will, therefore, be substituted, in the case of Blake, a sentence of nine months' imprisonment with hard labour, and, in the case of Hines, a sentence of six months' imprisonment with hard labour, and, as leave to appeal has been given, each sentence will date from conviction.

Sentences reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

LESLIE JAMES MORGAN.

1931.
24 *February.*

Severity of sentence (detention in a Borstal institution).

Appeal against sentence, by leave.

Appellant was convicted of larceny on January 7, 1931, at Gloucestershire Sessions and was ordered by the Chairman to be detained for three years in a Borstal institution.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This lad is only little more than eighteen years of age, and for the last twelve months he has been employed as a trimmer at a colliery. His parents are described as respectable and hard-working people. Only two trivial previous offences are reported against him. In the opinion of the Court, it is not desirable that he should be sent to Borstal, and he may be bound over in his own recognisances for two years with a direction that he report to the probation officer for Gloucestershire.

Sentence reduced.

T. R. F. B.

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HERBERT WALDING.

HERBERT WALDING.

Joint Indictment — Discrimination in Sentences — Borstal discipline.

Hewart, L.C.J., Avory, J., Humphreys, J.

In imposing detention in a Borstal institution, regard must be had to the circumstances and the antecedents of the offender.

Appeal against sentence.

Appellant pleaded guilty to two offences, one of shopbreaking with intent to steal, and one of shopbreaking and larceny, at Northampton Borough Sessions on January 9, 1931, and was ordered by the Recorder to be detained for two and a half years in a Borstal institution.

R. E. Manningham-Buller, for appellant, who was present:

The Recorder had no power to pass a sentence of Borstal detention on this lad. There was no evidence of "criminal habits or tendencies": STENSON AND ANOTHER, 22 Cr. App. Rep. 18: 1930; *s.r.*; CONNELL AND ANOTHER, 22 Cr. App. Rep. 102: 1930; *s.r.* In any event, in view of the lad's previous record, he is not a fit and proper person for such a sentence. He is nineteen years old and has not been previously convicted.

No counsel appeared for the Crown.

AVORY, J.: This lad and two other lads pleaded guilty to two offences of shopbreaking. One of them was bound over, and the other, who was named Wills, was ordered to be detained for three years in a Borstal institution. The appellant was ordered to be detained in a Borstal institution for two and a half years, the object of the difference made by the Recorder being, no doubt, that they should not come out together. In order to commit the first offence, the appellant and his companions climbed

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a water pipe from the street to the gutter of a billiard hall, twelve feet from the ground, and then went along the gutter and got on to a lead roof. They then forced a skylight, using some instrument, and so got into the premises. There they forced a till, but the till had nothing in it. They then tried to force a roll top desk. With regard to the second offence, there was a window of the premises which opened on to a flat roof. The window had been left screwed up and was forced with an instrument. Boxes of chocolates, packets of cigarettes, tins of tobacco, and a smock and towel, valued at £6, were stolen. The shelves were found practically empty.

Counsel has contended, in effect, that there was no jurisdiction to send this lad to Borstal. We cannot accede to that argument. The very nature of the offences would justify a court in drawing the inference that he had criminal tendencies at least. That in itself would be a justification in law for imposing that kind of punishment, but, having carefully considered the facts, we find a distinct difference in the case of the appellant and Wills. The report of the Commissioners in regard to Wills is "This lad's home circumstances have been deplorable, the parental control negligible, and criminal tendencies have been observed. Borstal detention is recommended," and, in regard to the appellant: "Borstal detention is only recommended if the court decides that a prolonged period of training and discipline is necessary for this lad." The evidence of the police was that the appellant had worked from October, 1925, to September, 1927, with a firm of boot manufacturers, that his conduct was satisfactory and that he had left only owing to shortness of work; that from October, 1927, to August, 1928, he worked for another firm of boot manufacturers and again left owing to shortness of work; and that he then worked from November, 1928, to September, 1930, and that his conduct was satisfactory. We have come to the conclusion that we are

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justified in altering the order made by the Recorder and requiring the appellant, if he is willing to do so, to enter into a recognisance in the sum of £5 to come up for judgment within two years if called upon, and in the meantime to be of good behaviour and to report to the probation officer of the district in which he lives.

Sentence reduced.

Solicitors for appellant: Williams & Kingston, Northampton.

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RAYMOND SMITH.

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RAYMOND SMITH.

Obtaining by False Pretences—Intent to defraud.

On an indictment for obtaining by false pretences the jury must be explicitly charged that they should not convict unless they find an "intent to defraud" the legal purport of which should, except in the clearest cases, be indicated.

Appeal against conviction, by leave of the Court.

Appellant was convicted at Gloucestershire Sessions on January 7, 1931, of obtaining money by false pretences, and was sentenced by the Deputy-Chairman to eighteen months' imprisonment with hard labour.

W. M. Andrew, for appellant (under section 10 of the Criminal Appeal Act, 1907), who was present:

The whole trial exhibited the fatal flaw that the jury were never told that "intent to defraud" is a necessary ingredient of the offence. The summing-up dealt almost entirely with the question of identity, the defence being an *alibi*: MARCK, 21 Cr. App. Rep. 65: 1928; *c.q.*

W. Price, for the Crown:

"Intent to defraud" was not referred to in specific terms, but the question whether there was or was not such

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an intent must have been present to the mind of the jury. The facts of the case were simple. Appellant, in company with another man, called on an old lady on Christmas Eve and told her a tale of distress. He said that he had been sent by a clergyman, known to the lady and that he had been employed by a person also known to her. Both these persons said that they did not know the appellant. The lady was induced to give him £3, the appellant promising to repay 10s. on the following morning and the remainder on the following Monday. M. FERGUSON, 9 Cr. App. Rep. 113: 1913; *c.q.*, is an authority for the proposition that, where the facts are quite simple, a conviction may stand, although the jury's attention has not been directed to the necessity of an intent to defraud being established.

[THE LORD CHIEF JUSTICE referred to SECOMBE, 12 Cr. App. Rep. 275: 1917; *c.q.*]

THE LORD CHIEF JUSTICE: It is a very unfortunate fact that in the summing-up the jury's attention was not directed to the most material point, that intent to defraud is of the essence of this offence. In view of the decisions of this Court, we feel that we have no alternative. Our attention has been directed to M. FERGUSON. The Court in that case consisted of Bray, Avory and Lush, JJ., and Avory, J., who delivered the judgment of the Court said: "We do not say that in every summing-up on a charge of false pretences which does not draw attention to this question there is necessarily a misdirection. There are cases where it is impossible that the money could be obtained unless there was an intent to defraud; it may be inferred from the circumstances of the case. But this case is not one of them," and a little later he went on to say: "The appellant's case was that he was entitled to call it [the frame which he was accused of having obtained by false pretences] a rosewood frame, so it was necessary for the jury to determine whether there had been an intent to defraud."

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Here the evidence undoubtedly was that there was a promise to return the money in two instalments and, therefore, after much consideration, following the case of FERGUSON and also the case of SECOMBE, we have come to the conclusion that here there ought to have been a direction to the jury that "intent to defraud" was an essential ingredient of the offence. It is a very unfortunate case, and it is highly desirable that the law should be understood, that, unless the facts are abundantly clear, there must be a direction to the jury on "intent to defraud," where the charge is one of obtaining by false pretences. In the circumstances, it is enough to say that we feel that this appeal must be allowed and this conviction quashed.

Conviction quashed.

T. R. F. B.

GEORGE VEREKER GREEN-EMMOTT.

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GEORGE VEREKER GREEN-EMMOTT.

Hewart, L.C.J., Avory, J., Humphreys, J.

Recognisance—Certified Lunatic.

There is a legal presumption that a certified lunatic is incapable of entering into a recognisance.

Appeal against conviction and sentence, by leave of the Court.

Appellant pleaded guilty at Manchester Assizes on May 6, 1929, to gross indecency with a male person. Viscount Finlay, J., ordered that he be bound over upon entering into a recognisance. He was subsequently brought up at Liverpool Assizes for a breach of the above recognisance and on December 9, 1930, was sentenced by Macnaghten, J., to ten months' imprisonment.

C. T. B. Leigh, for appellant, who was present:

It is not sought to dispute the propriety of the conviction of the appellant, on his own confession, for gross indecency. The contention is that the recognisance into which the appellant entered was not binding on him and that, therefore, the sentence imposed on him on the basis that there had been a breach of the recognisance ought to be quashed. The recognisance was in the following terms: Appellant "is bound over in the sum of £100 to keep the peace and be of good behaviour for two years and to come up for judgment, if called upon, within two years and to return to S. Andrew's Mental Hospital at Northampton and remain there or at some other mental hospital until discharged therefrom and to remain in custody at H.M. Prison at Manchester until he can be conveyed by officers of the S. Andrew's Mental Hospital to that Hospital." The

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breach of recognisance with which the appellant was charged was escape from the mental hospital before discharge. It is submitted that the recognisance was not binding on the appellant, because he was a certified lunatic, to the knowledge of the court, at the time when he entered into it. At common law the general rule was that no binding contract could be entered into by an insane person, but there was an exception in the case of contracts of record: BEVERLEY'S CASE, 4 Co. Rep. 123 b; 2 Inst. 14; Reg. Brev. 267; F. N. B. 532: 1603. That principle, however, is no longer law. A contract of record may still act as an estoppel elsewhere, but it cannot be an estoppel in this Court. THOMPSON *v.* LEACH, 3 Mod. Rep. 296: 1690, and STOKES *v.* OLIVER, 5 Mod. Rep. 209: 1696, show that contracts of record, such as suffering a fine or levying a recovery, which had been entered into by an insane person, could be upset, though not at the instance of the person whose insanity was in question. But IMPERIAL LOAN CO. *v.* STONE, 1892, 1 Q. B. 599; 61 L. J. Q. B. 449; 66 L. T. 556; 56 J. P. 436, makes it clear that the proposition that an insane person cannot avoid a contract by setting up his own disability is no longer good law. As the law now stands, there is a presumption that, while a person is under the status of being certified as a lunatic, everything that he does is bad; to render him liable on a contract it must be shown affirmatively that he understood what he was doing. Here there was no evidence that the appellant entered into this recognisance during a lucid interval. No medical evidence was called at the trial: the judge merely interviewed the appellant's mother in his private room before deciding to bind the appellant over.

H. Elam, for the Crown:

There was evidence that the appellant was sufficiently sane to enable him to enter into a recognisance. No question of his fitness to plead was raised, though he was represented by counsel at the trial. He was of sufficient

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intellect to plead to the indictment and to express his willingness to enter into the recognisance. The inference can fairly be drawn that he was sufficiently sane to enter into it.

Leigh, in reply, referred to DAILY TELEGRAPH NEWSPAPER CO., LTD. *v.* MCLAUGHLIN, 1904, A. C. 776; 73 L. J. P. C. 95; 91 L. T. 233; 20 T. L. R. 674, and VAN GRUTTEN *v.* FOXWELL, 1897, A. C. 658; 66 L. J. Q. B. 745; 77 L. T. 170; 84 L. T. 545; 12 T. L. R. 307.

THE LORD CHIEF JUSTICE: This appellant pleaded guilty in May, 1929, at Manchester Assizes to an indictment which charged him with gross indecency. He was bound over and entered into a recognisance. In December, 1930, he was brought up for sentence for breach of recognisance and sentenced to ten months' imprisonment. The breach of recognisance consisted in his escape from a certain institution, where he had undertaken to remain until he was discharged. He now appeals in terms against conviction and sentence; what that means, no doubt, is—it is contended—that there was no breach of recognisance, because his allegation is that at the time when he entered into the recognisance he had been certified as insane. There is no doubt that he had been so certified: the transcript of the shorthand note makes that quite plain.

The question which we have to consider is whether a person who has been certified to be insane can, during the time when he is certified to be insane, enter into a binding recognisance. Our attention has been directed to a long series of authorities, many of which are not really helpful on this point, but the fact seems to be that the certificate of insanity raised a presumption of insanity which held good unless it was displaced by evidence. After careful consideration, the Court has come to the conclusion that there was here no evidence to displace the presumption raised by the medical certificate, and that, therefore, this

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appeal ought to succeed. The sentence of ten months' imprisonment, it follows, will be quashed.

Sentence quashed.

Solicitors for appellant : Boote, Dutton & Whittaker, Manchester.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE HUMPHREYS.

1931. 2 *March.*

GRANVILLE PICKUP.

"*Intent to defraud*"—*Summing Up*—"*Subsidiary*" *Circumstances.*

It is a misdirection to suggest that evidence on a charge of obtaining by false pretences which tends to disprove an intent to defraud is "subsidiary" to the real issue, even though that evidence *per se* does not constitute a defence.

Appeal against conviction and sentence.

Appellant was convicted at Burnley Sessions on January 23, 1931, of obtaining a motor-car and money by false pretences, and was sentenced by the Recorder to four months' imprisonment in the second division.

Gurney G. Beagley, for appellant, who was present:

Appellant had acquired possession of a motor-car from the Ebor Trading Co. under a hire-purchase agreement, which provided that until all the instalments due under the agreement and a nominal sum of 1s. had been paid the car was to remain the property of the company. In

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March, 1927, he sold the car for £150 plus another motor-car to a Mr. Nutter. He did not tell Mr. Nutter that the car was subject to a hire-purchase agreement, but, according to the prosecution, said "Yes" to a question whether it was his own car. At the time of the sale there was owing by the appellant a sum of about £50 for arrears on instalments, and a further sum of about £70 was due on further instalments. After he had received the £150 and before he received the car from Mr. Nutter, appellant paid off all arrears due to the Ebor Trading Co. and later paid other sums in discharge of his debt to them, and before the police-court hearing Mr. Nutter agreed to accept certain property of the appellant in discharge of the liabilities which had been transferred to him by the Ebor Trading Co. Appellant was indicted for obtaining from Mr. Nutter a cheque for £150 and a motor-car by falsely pretending that a car delivered by him to Mr. Nutter was his own property. At the trial appellant declined legal aid. When the Recorder came to sum up the case, though he told the jury that "intent to defraud" was a necessary ingredient of the offence, he told them to disregard matters which were in fact material. He said: "If you accept the evidence of the prosecution in this case, a Mr. Nutter was induced by these false pretences, these fraudulent false pretences, to a course of action to his detriment. . . . It seems to me we have gone into a great number of outside matters which really have very little to do with the case. They may of course be important in helping you to consider whether or not there was any intent to defraud and I am glad that at the last moment we found out that of the cheque of £150 he received £55 was, in fact, paid over in March. Really that part of the case is a purely subsidiary matter."

Arthur Ridehalgh, for the Crown:

The jury were repeatedly told that it must be proved that there was an "intent to defraud" before there could

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be a conviction. Any misapprehension created by the passages complained of was dispelled later by a direction that before convicting they must be satisfied that there was an intent to defraud. There was evidence on which they might properly convict.

AVORY, J.: There is no question that at the time when the appellant transferred this car to Mr. Nutter he had no right in law to transfer the property in the car. He held it under a hire-purchase agreement which expressly provided that, until the final instalment and a nominal sum of 1s. had been paid, the car was to remain the property of the Ebor Trading Co. At the time when the appellant handed over the car to Mr. Nutter, there was due from him a sum of about £50 odd as arrears of instalments and a further sum of about £70 for further instalments. Although he was not in law at that time entitled to transfer this property, the circumstances were such that it is quite possible to believe that he might have handed it over to Mr. Nutter without an intent to defraud, assuming that he honestly believed that he had means to pay off the balance owing to the company or that he would soon be in a position to do so. It was, therefore, of the essence of the case that the jury should be directed on the facts which were material for them to consider in determining whether he had that intent. It is quite true that there was evidence for the consideration of the jury that this may have been done with intent to defraud. On the other hand, there was considerable evidence for the consideration of the jury, in the appellant's subsequent conduct, which might fairly lead to the opposite conclusion, and which ought at least to have been considered by the jury. When we come to consider the summing-up as a whole, it is quite clear that matters proper for the jury to consider on this issue were withheld from them. [His Lordship referred to the facts and the summing-up as set out above,

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and continued:] It was quite wrong and improper to tell the jury that those matters were outside matters, and, after telling the jury to consider whether there was an intent to defraud, to say "really that part of the case is a subsidiary matter"—in other words, to tell the jury that the facts which the appellant was putting forward as evidence that he had no intent to defraud were a subsidiary matter.

We have come to the conclusion that there was here a serious misdirection of the jury on this vital issue, and that in these circumstances this conviction cannot stand.

Conviction quashed.

Solicitors for appellant: W. J. & E. H. Tremellen, agents for Mossop & Bowling, Burnley.

T. R. F. B.

WILLIAM JOHN VARLOW.

1931.
2 *March.*

WILLIAM JOHN VARLOW.

Hewart, L.C.J., Avory, J., Humphreys, J.

Severity of sentence.

Appeal against sentence.

Appellant was convicted of sodomy at Dorset Assizes on January 19, 1931, and was sentenced by Wright, J., to four years' penal servitude.

W. M. Walker, for the appellant:

The appellant was in the Navy and had previously borne an excellent character. There was no question of the corruption of youth in this case, as the offence was committed upon a grown man when asleep who, as soon as he realised what was happening, severely chastised the appellant. The appellant has already been punished

1931.
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WILLIAM JOHN VARLOW.

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severely, in that he has lost his career and forfeited his pension.

No counsel appeared for the Crown

AVORY, J.: This offence is one which, no doubt, in the ordinary course deserves and generally receives a sentence of penal servitude. The circumstances of this case are altogether exceptional. It is not a case where there has been any corruption of a young boy, and really the only explanation of the appellant's conduct, having regard to his previous character, is that he must have been hardly in possession of his senses, possibly owing to excessive indulgence in alcohol. That is not an excuse for crime, but it may be an explanation of the conduct of a man who for fourteen years at least has borne an exemplary character in the Navy. Treating, therefore, this as quite an exceptional case, and without in any sense suggesting that such a sentence is inappropriate to the offence, we reduce this sentence to one of eighteen months' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

Solicitors for appellant: Williamson, Hill & Co., agents for Sir A. Pengilly, Weymouth.

T. R. F. B.

ARTHUR MICHAEL FISHER.

1931.
2 *March.*

ARTHUR MICHAEL FISHER.

Hewart, L.C.J., Avory, J., Humphreys, J.

Severity of sentence.

Appeal against sentence, by leave.

Appellant pleaded guilty at the Central Criminal Court on January 14, 1931, to demanding money with menaces and to uttering letters demanding money with menaces, and was sentenced by the Recorder to ten years' penal servitude.

Appellant in person.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The case raises a question of considerable difficulty, because on the one hand the appellant is described as being a splendid workman, and on the other hand this Court can never take any step which would be likely to make it appear that the offence of demanding money with menaces is anything but an extremely grave offence.

The appellant, who was engaged in certain work of repair, observed, or professed to observe, somebody else committing a reprehensible act, and applied for money, and ultimately received £100 in all. The offence is a detestable one, and, in its gravest aspects, has been, and no doubt will be, punished with the severest possible sentences. A learned judge has, however, granted leave to appeal, and in view of all the circumstances, and not least in view of the youth of the appellant and his otherwise good character, and the complete absence of anything in the nature of premeditation or a trap, we have come to the conclusion, not without hesitation, that this sentence may suitably be reduced to one of five years' penal servitude, to run from the date of conviction.

Sentence reduced.

T. R. F. B.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SWIFT AND MR. JUSTICE HUMPHREYS.

1931.
9 *March.*

LEONARD WILLIAM CROSS.

Breaking—Entering—Stealing.

When on an indictment for breaking and larceny there is no evidence of the latter the jury must be directed so to find.

Appeal against conviction and sentence, by leave of the Court.

Appellant, who appeared in person, was convicted at Walsall Borough Sessions on December 4, 1930, of breaking and entering and stealing, and was sentenced by the Recorder to twenty-one months' imprisonment with hard labour.

THE LORD CHIEF JUSTICE said that on the evidence the Court were of opinion that the appellant ought not to have been convicted of breaking and entering and stealing but of breaking and entering with intent to steal. The Court would therefore substitute for the verdict found by the jury a verdict of guilty of breaking and entering with intent to steal. The sentence would be reduced to one of fifteen months' imprisonment with hard labour, to run from date of conviction.

Verdict substituted.
Sentence reduced.

H. M. P.

RICHARD HAYWOOD.

1931.
9 *March.*

RICHARD HAYWOOD.

Hewart, L.C.J., Swift, J., Humphreys, J.

Severity of sentence.

Appeal against sentence, by leave of the Court.

Appellant was convicted of burglary and larceny at the Buckinghamshire Assizes on January 13, 1931, and was sentenced by Talbot, J., to three years' penal servitude.

G. L. Hardy, for the appellant, who was present.
Horace B. Samuel, for the Crown.

The sentence was reduced to one of twenty months' imprisonment with hard labour, to run from the date of conviction.

THE LORD CHIEF JUSTICE said that, notwithstanding the gravity of the offence, the Court were of opinion that as the appellant was only twenty-one years of age he should be given another chance before being sent into penal servitude.

Sentence reduced.

H. M. P.

Solicitors for appellant: Marris & Shepherd.

1931.
9 *March.*

FRANCIS HECTOR SCHOFIELD.

Hewart, L.C.J., Swift, J., Humphreys, J.

FRANCIS HECTOR SCHOFIELD.

Severity of sentence.

Appeal against sentence, by leave of the Court.

Appellant pleaded guilty at Norwich City Sessions on January 20, 1931, to shopbreaking and housebreaking, and was sentenced by the Deputy-Recorder to seven years' penal servitude.

F. T. Alpe, for appellant, who was present:

From 1923, when he was sentenced to four months' hard labour, till 1930 the appellant had endeavoured, so far as was known, to work honestly. He apparently broke out again after failing in business and also after he had had a very serious motor accident.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE, after referring to the gravity of the offences, said that in the circumstances the sentence could properly be reduced from one of seven years' penal servitude to one of four years' penal servitude, to run from the date of conviction.

Sentence reduced.

Solicitors for appellant: Hatch & Hatch, Norwich.

H. M. P.

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